

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA,) CASE NO. 4:21-cr-00005-O-1
)
Government,) FORT WORTH, TEXAS
)
VS.) MAY 3, 2022
)
THE BOEING COMPANY,)
)
Defendant.) 9:02 A.M.

VOLUME 1 of 1
TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE REED C. O'CONNOR
UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

MAY 3, 2022

oOo

THE COURT: Please be seated.

All right. Thank you all for being here.

Okay. Let's start. First, who is here for the
movants?

MR. NICHOLSON: Morning, your Honor. Darren
Nicholson with Burns Charest on behalf of the movants.

I would like to introduce the Court to Mr. Paul
Cassell, who will be taking the lead this morning.

THE COURT: Very good. Thank you.

MS. APPLEBAUM: Good morning, your Honor. Erin
Applebaum from Kreindler & Kreindler, LLP.

THE COURT: Very good.

MS. BRAMMEIER: Tracy Brammeier from the Clifford
Law Offices in Chicago.

THE COURT: Very good. Thank you. Thank you all
for being here.

MR. CASSELL: Your Honor, with the Court's
permission, I would also like to introduce some of my
clients who also traveled a great distance to be here this
morning.

THE COURT: Yes.

MR. CASSELL: Michael Stumo and Nadia Milleron

1 traveled from Massachusetts today. We have Catherine
2 Berthet, who's traveled from France today. She lost her
3 daughter in the crashes.

4 Chris and David Moore are here. Chris lost his
5 son. We also have Ike Riffel who traveled from California.
6 Tomra Vecere who has traveled from Massachusetts.

7 And I don't want to overlook Paul Njoroge. He's
8 here from Canada. He lost his wife and three children in
9 the crashes.

10 THE COURT: Thank you all for being here.

11 All right. And for the government?

12 MR. DUFFY: Good morning, your Honor. Jerrob
13 Duffy and Chad Meacham for the United States.

14 THE COURT: Okay. Thank you for being here.

15 And then finally, for Boeing?

16 MR. HATCH: Good morning, your Honor. Ben Hatch,
17 McGuireWoods, on behalf of Boeing.

18 MR. HANEY: Patrick Haney, Kirkland and Ellis, for
19 Boeing.

20 MR. SANTOS: Brandon Santos, McGuireWoods.

21 MR. HATCH: And we also have our colleague, Ian
22 Hatch.

23 THE COURT: Very good.

24 MS. BAUER: Elissa Bauer, McGuireWoods.

25 THE COURT: All right. Very good. Thank you all.

1 Mr. Cassell, I will turn the floor over to you.

2 MR. CASSELL: Thank you very much, your Honor.

3 And the victims' families very much appreciate you
4 scheduling a hearing on these motions.

5 I know we have four motions in front of the Court
6 today. I know your time is also very valuable, so I will
7 try to get through them as expeditiously as possible.

8 THE COURT: I've got the morning set aside for
9 you.

10 MR. CASSELL: All right. I want to start with
11 what I think is the central motion in this case, and that's
12 the Crime Victims' Rights Act or CVRA motion, because I
13 think some of the other issues end up revolving around that.

14 There's a related motion. Our motion for
15 disclosure of information from the government that connects
16 into that.

17 And as you are aware, we also have a supervisory
18 powers motion and an arraignment motion. But let me just
19 try to jump right into what I think is the main issue here,
20 the Crime Victims' Rights Act.

21 There are three rights that are important. Now,
22 the Crime Victims' Rights Act was passed in 2004 to
23 restructure the federal criminal justice system.

24 It's essentially a bill of rights for crime
25 victims. And there are three rights that I will be

1 referring to today that are obviously essential to our
2 moving papers.

3 The first is the right to confer with a government
4 attorney on a case. The second is the right to timely
5 notice of a deferred prosecution agreement or DPA.

6 And the third is the right to be treated with
7 fairness. I really don't think there's any dispute that if
8 the victims' families are representing crime victims under
9 the CVRA, then the government has violated their rights.

10 The government has admitted they never conferred
11 with the families. In fact, they've apologized for not
12 conferring with the families. In their brief they promise
13 that they're going to make sure this never happens again.

14 So the issue is whether, in this case, the failure
15 to confer was a failure to confer with crime victims.
16 There's also no dispute that the government did not give the
17 victims' families any notice whatsoever of the DPA. It was
18 filed on this Court's docket without any notice to 346
19 families.

20 And there's no dispute that the government
21 deceived the victims by telling them that there was no
22 investigation going on in the crashes when, in fact, there
23 was.

24 So, if the Court rules in our favor on the crime
25 victim issue, we think, like a set of dominoes, the

1 violation of the act is clear.

2 So the issue then is, are the victims' families
3 who are here representing the family members who were killed
4 in the crashes, are they representing crime victims?

5 The CVRA says a crime victim is a person directly
6 and proximately harmed as a result of the crime. We've
7 cited legislative history in our papers that Congress used
8 an intentionally broad definition to try to create an
9 expansive set of protections for victims in the Crime
10 Victims' Rights Act.

11 We've cited the Fifth Circuit authorities,
12 including Fisher I from the Fifth Circuit, a case I argued
13 in 2011. And the Fifth Circuit says that you look initially
14 to the crime at issue, but you can look beyond that to see
15 the effects of the crime in making the crime victim
16 determination.

17 And just one last procedural point, because I
18 think the government's briefing has kind of obscured the key
19 issue here. The government has referred to proof beyond a
20 reasonable doubt at various points in its papers, but that's
21 the standard of proof that your Honor would use or the jury
22 would use at the conclusion of a criminal trial when a
23 defendant's liberty is at stake.

24 Of course, we're here this morning on pretrial
25 motions, and the standard of proof for those kinds of

1 motions is preponderance of the evidence. And we've cited
2 in our brief a number of CVRA cases from the District Court
3 from the Sixth Circuit holding, I think without any disputes
4 from any other courts in the country, that the standard of
5 proof that you would apply to this is preponderance of the
6 evidence: Who has the better of the argument?

7 And obviously we believe that the evidence shows
8 that we do. And, in fact, we've had four arguments advanced
9 in our papers as to why the crash victims were crime victims
10 under the CVRA. So let me dive right into those different
11 arguments that we have.

12 Let me take two together. The first two that
13 we've laid out is during the crash investigation, the crash
14 victims were crime victims. And then ultimately, when the
15 DPA was the outcome of that investigation, again, the crash
16 victims were crime victims.

17 The Court's well aware -- I know that you've
18 recently been involved in some other litigation concerning
19 two crashes on October 29th, 2018, and then March 10th,
20 2019 -- the Justice Department began investigating those
21 crashes.

22 Now, again, I make that assertion, the government
23 has been a little bit coy about this in their briefs. They
24 haven't told us exactly what they were doing, but we've been
25 able to piece together from documents that cannot be

1 reasonably disputed that, after those crashes, the
2 government began investigating the crashes.

3 For example, in our papers we cite the Form 10-K
4 that Boeing filed in January of 2020, which said it was
5 cooperating with the Justice Department's investigation into
6 the crashes.

7 And the victims' families, some of the family
8 members seated here, read Boeing's announcement that they
9 were cooperating with the criminal investigation. So they
10 called the Justice Department.

11 In fact, they called the Crime Victims Rights
12 ombudsman and said, we are reading in the papers that you're
13 investigating the crashes. We want to confer. We want to
14 talk to you about our losses in the case and how we think
15 the case should be resolved.

16 What the government said, ironically through the
17 victims' rights ombudsman is, no such investigation, and
18 victims were confused by that. They called the FBI, the
19 victim witness office. And there, again, they were told
20 there is no investigation into the crashes.

21 Now, let's not mince words. Those were false
22 statements that the United States Department of Justice gave
23 to 346 grieving families around the world. They've admitted
24 it was inaccurate information because they were
25 investigating the crashes.

1 And there's been no explanation offered, no
2 affidavits, no information, no explanation whatsoever from
3 the Justice Department about how it could make those false
4 representations to the families out there.

5 So now the government's investigation continues
6 for another 11 months with the families thinking there's no
7 criminal investigation. So you can imagine the shock and
8 dismay when families around the world learn on Twitter or
9 Facebook or something like that that the government has cut
10 a secret deal with Boeing that will the block its criminal
11 prosecution for the crashes.

12 Now, I think it violates fundamental human decency
13 to think that you could spring an announcement like that on
14 victims' families. But critically, for today's hearing, it
15 clearly violated the Crime Victims' Rights Act.

16 I mentioned already one of the provisions in the
17 Crime Victims' Rights Act is a provision requiring that the
18 Justice Department provide timely notice of a deferred
19 prosecution.

20 We've explained in our papers, Congress added that
21 provision, Senator Cruz and others worked on amending the
22 CVRA to expand it so that it included timely notice of a
23 deferred prosecution agreement so the victims could be heard
24 and potentially shape the outcome of that deferred
25 prosecution agreement.

1 We've also cited In re Dean, a case that I argued
2 to the Fifth Circuit in 2018. And in In re Dean, the Fifth
3 Circuit clearly held that the CVRA applies even before
4 charges are filed.

5 The reason for that, said the Fifth Circuit, is
6 Congress has made a policy decision, which courts are bound
7 to enforce, that victims have the right to be heard during
8 the plea bargaining process, and that simply didn't happen
9 here.

10 And as a result, we know that the government has
11 clearly violated the rights of crime victims. Let's be
12 clear. What does that DPA do?

13 Again, the government was a little vague when it
14 crafted it. Your Honor may have seen what I think are the
15 standard approaches to deferred prosecution agreements,
16 where the agreement will spell out specifically which crimes
17 are covered, which defendants are being immunized or
18 precluded from prosecution.

19 This agreement didn't do that. Instead, it's
20 nebulous wording that's very broad. But the wording is
21 broad enough, and I'm assuming that the government will
22 confirm that it precludes prosecuting Boeing for 364 counts
23 of manslaughter, among other crimes mentioned in the crash.

24 Clearly, the victims' families represent victims
25 of manslaughter crimes. And so at that point, that would be

1 all the Court has to conclude. I don't think anything I've
2 said so far involves a factual dispute. The Court can
3 simply reach that ruling, and then move on to the remedy
4 stages of the case.

5 Now, we have another argument, separate and
6 independent from what I've just advanced, which we've
7 identified as the risk argument; that Boeing's conspiracy of
8 lies to the FAA produced risk to passengers and crew.

9 I think there's a simple way, again, to
10 demonstrate that fact that wouldn't involve the Court in any
11 factual disputes. You could rule this morning, if you were
12 inclined to do so, in our favor on the risk argument.

13 And the way I want to present this argument is to
14 take you to a particular place and a particular time. So
15 let's go to 6:32 a.m. local time, on October 29th, 2018,
16 aboard Lion Air, Flight 610, which is over the Java Sea with
17 189 passengers and crew.

18 At 6:32 a.m. local time, Boeing's MCAS system
19 activated, driving the nose of that aircraft down toward the
20 Java Sea. At that point in time, the crew was engaged in a
21 life-or-death struggle to regain control of aircraft.

22 What do we know about that point in time? We know
23 that nothing in Boeing's flight manual, the FCOM, Flight
24 Crew Operations Manual, even mentioned MCAS substantively,
25 let alone told the crew what they should do.

1 We also know that the crew had no training
2 whatsoever. They didn't know what they were up against.
3 So, at that point in time, again, your Honor could conclude
4 that Boeing's crime created risk to the passengers and crew,
5 and risk would be a harm creating crime victim status.

6 Let me take you to another point in time at
7 another place. 8:39 a.m. local time, March 10th, 2019,
8 aboard Ethiopian Airlines, Flight 302, on the outskirts of
9 Addis Ababa with 157 passengers and crew on board.

10 Once again, the MCAS system improperly activated,
11 driving the nose of that aircraft down. And shockingly,
12 this was four and a half months after exactly the same thing
13 had happened with the Lion Air flight.

14 And here again, and no dispute on these facts, the
15 Ethiopian authorities have issued an official report on
16 this, a flight manual did not tell the crew what they were
17 up against. They had no training whatsoever in how to deal
18 with MCAS activation.

19 So, at that point, it cannot be reasonably
20 disputed, with regard to both of those flights, Boeing's
21 crime created risk to the passengers and crew.

22 How do we know for sure that there was risk
23 created? The government has admitted it. Take a look --
24 for example, let's go right to the criminal information that
25 is on this Court's docket in this case.

1 Here's what the criminal information says: "Boeing
2 willfully conspired 'To defraud the U.S. by impairing,
3 obstructing, defeating, and interfering with, by dishonest
4 means,' a lawful function of the FAA AEG," that is,
5 interfering with the safety regulators in this country.

6 Here's the government's press release, handed out
7 a few minutes after they filed the DPA on your docket. This
8 is the government speaking in a press release. "The
9 misleading statements, half-truths, omissions communicated
10 by Boeing's employees to the FAA," here's the key language,
11 "impeded the government's ability to ensure the safety of
12 the flying public."

13 So you would simply have to rely on statements
14 from the government. You could also look at the statements
15 of fact, paragraph 44, where Boeing and the government both
16 admitted that, as a result of Boeing's conspiracy crime,
17 MCAS was not in the flight crew manuals and the training
18 that was available to those who were flying the 737.

19 Again, we think you could rule immediately, based
20 on undisputed facts, that the passengers and crew suffered
21 risk.

22 Let me be clear. The Crime Victims' Rights Act
23 doesn't require you to find that a victim suffered physical
24 harm or financial harm. The only word that's used in there
25 is "harm."

1 That's a broad term that can include the kind of
2 risks that we're talking about this morning. And you could
3 conclude that there was harm inflicted on them because they
4 were placed on a -- in a riskier position.

5 So on any of those three arguments, we think the
6 Court can rule immediately based on the existing record that
7 the victims' families represent crash victims who were crime
8 victims under the CVRA.

9 Because, you know, we have a fourth argument that
10 may involve some disputed facts. I'm not really sure how
11 many disputed facts it involved, but what I want to be clear
12 here this morning is, in outlining these other arguments,
13 which I think you could rule on immediately, it's not
14 because we're in any way concerned that we could not prove
15 what happened here.

16 The victims' families are ready, willing, and able
17 to convincingly demonstrate, if you give us an evidentiary
18 hearing, that Boeing's conspiracy of lies killed 346
19 innocent people. That's the stone cold truth of the matter,
20 once the Court has all the facts in front of it.

21 And we filed -- this isn't lawyer hyperbole here.
22 You've seen our 53-page proffer, single spaced, for the
23 record, that lays out all of the facts that we would prove
24 if we had an evidentiary hearing.

25 And we've also filed three expert reports at

1 docket entry 76, one, two, three, again reinforcing that
2 conclusion. We don't think you need expert assistance to
3 reach the conclusion, but if the Court would like expert
4 assistance, we've provided that as well.

5 So if for any reason you can't rule in our favor
6 on the other arguments, then, at an absolute minimum, we're
7 entitled to an evidentiary hearing where we will prove what
8 is the truth in this case.

9 Now, what is the parties' response to our request
10 for an evidentiary hearing? I mean, I think you've probably
11 seen the same sentence or two that I've seen. No, they're
12 not entitled to an evidentiary hearing, and then kind of
13 move on from there.

14 But the government has conceded that you have
15 inherent discovery power to investigate the facts of the
16 situation in front of you to make appropriate rulings.

17 They cite, and we think this is the right case,
18 Natural Gas Pipeline vs. Energy Gathering, a Fifth Circuit
19 case from 1993. So you would gather the facts, give us an
20 opportunity to prove the direct and proximate connection
21 between Boeing's conspiracy of lies and the deaths of 346
22 people.

23 The Fifth Circuit has also said you have to do
24 that. We've cited, again in our papers, I think the best
25 case on this one is Fisher II, a case that I argued to the

1 Fifth Circuit in 2011 that collected various cases where
2 Courts have been required to look beyond the charging
3 document and determine what the facts of the case were.

4 And it's unsurprising that you might have to look
5 beyond the charging document to make the crime victim
6 determination.

7 In Fisher II, the Fifth Circuit said, look, if
8 there's a disputed issue on who is a crime victim, the way
9 the Court should proceed is to create a mental picture of
10 the world without the defendant's crime. So that's going to
11 inevitably require some fact-finding or some understanding
12 of the facts of the case.

13 What you do in this case is you take out Boeing's
14 two-year conspiracy of lies to the FAA, remove that fact,
15 and then what does the world look like? We think the answer
16 to that question is clear: 346 people would not have died
17 in two crashes.

18 Now, at some points in their brief it seems like
19 the government is suggesting, okay, you know, let's move on.
20 Your Honor, you couldn't award any remedy so you don't have
21 to decide whether the victims are crime victims under the
22 CVRA.

23 That's just flat-out wrong, for this reason: We
24 are here this morning asking for a determination that we
25 possess, my -- the family members possess crime victim

1 status because that will have prospective meaning.

2 The government has yet to confer with us about why
3 they did this. If you were to rule this morning that these
4 families are crime victims under the CVRA, we would
5 immediately go to the government, and say, all right, we
6 want to discuss this with you. We want to exercise our
7 right to confer under the CVRA.

8 So the Court doesn't have, in our view, any option
9 to avoid this issue because we want to know today whether
10 they're protected under the CVRA so that we get all the
11 rights that the CVRA provides.

12 But, in addition to prospective application, the
13 CVRA is also going to have retrospective application here.
14 And that's an obligation that's imposed on this Court by
15 Congress in Section 3771(1)(b)(1) of the CVRA.

16 That's the provision -- you can see what Congress
17 has tried to do here. That's the provision giving the CVRA
18 meaning. It says, the Court shall "ensure that the crime
19 victim is afforded the rights described in the CVRA."

20 Without that kind of enforcement mechanism, the
21 CVRA would be meaningless. We would have the government
22 doing what they did in this case, and say, oh, we're, sorry.
23 See ya later.

24 You are obligated under the CVRA to ensure that
25 these families have their rights under the CVRA. And the

1 way to do that is to give them the right to confer with the
2 government about the DPA. Wait a minute. The DPA says
3 Boeing can never be prosecuted.

4 So the logical step in creating a remedy in this
5 case is to remove those provisions from the DPA so that the
6 victims' families can then meaningfully confer with the
7 prosecutors at a time when their input could make a
8 difference.

9 There's one case right on point for that very
10 proposition. It's a case that I've argued the last ten
11 years in front of Judge Marra down in the Southern District
12 of Florida, the Jeffrey Epstein case.

13 And in the Epstein case the same thing happened.
14 The government did a secret deal with a wealthy defendant,
15 and then the victims learned about it later.

16 And so we went to Judge Marra and said, hey, we
17 were never given the opportunity -- the victims were never
18 given the opportunity to confer with the prosecutors about
19 this nonprosecution agreement, and you should give us that
20 opportunity.

21 And Judge Marra agreed. He said, well, I'm going
22 to need to do some fact-finding, but if you connect the
23 facts here and show that you were crime victims, and that
24 the government didn't confer with you properly, then I will
25 set aside the provisions in the nonprosecution agreement.

1 And this is what he said, I will set those aside
2 "as a prelude to the full, unfettered exercise of the
3 victims' conferral rights at a time that will enable the
4 victims to exercise those rights meaningfully."

5 The victims' families here want a chance to go to
6 the government, when it's meaningful, and say, here's why
7 you should prosecute Boeing. Here's the way you can do it.
8 Here's the way we think the case should be handled.

9 Let's be clear. Prosecutors do have discretion.
10 We're not disputing that. They may end up disagreeing with
11 the victims' families after that presentation is made.

12 The victims' families were promised by Congress
13 that they would have an opportunity to go to those
14 prosecutors and convince them to prosecute Boeing, and that
15 never happened in this case. And this Court must ensure
16 that it happens. That's one of the remedies available.

17 We would also call to your Honor's attention, we
18 were pleased to see, just this last week, Senator Cruz, who
19 has been involved in drafting the CVRA, filing an amicus
20 brief urging this Court to take a careful look at the kind
21 of remedies that would be available, and he listed some
22 possibilities as well.

23 So for all those reasons, we would ask the Court
24 to conclude that the victims' families are here representing
25 crash victims who are crime victims under the CVRA.

1 So that's our -- I don't want to tread on the
2 Court's patience too much, but that's our first motion.

3 With the Court's permission, I would move on then
4 to our second motion, which I think is related.

5 All right. So the second motion is what I will
6 refer to as the disclosure of information motion.

7 Let's assume, we've tried to lay out some ways in
8 which the Court could avoid time-consuming or complicated
9 fact-finding, but if you think fact-finding is appropriate
10 in this case, then our next motion, motion for disclosure of
11 information, rests on a simple premise: If the Court is
12 going to make factual findings, it should have the relevant
13 information.

14 And remarkably, the government seems to disagree
15 with that. They seem to think that they can sit on
16 literally millions of pages of documents, as you know from
17 some other litigation you've been involved with, that would
18 help us prove our case.

19 And then they want you to conclude, oh, the
20 victims' families aren't really victims here. Well, they
21 have information in their files that would prove that very
22 point.

23 Now, that position strikes me as not only
24 violating fundamental precepts of human decency, but also
25 violating common sense, and particularly important for this

1 morning, violating the CVRA.

2 I've just mentioned that you have an obligation
3 under the CVRA to ensure that the crime victim is afforded
4 the rights under the CVRA.

5 Well, how can you do that if you don't have all
6 the facts in front of you? You have inherent power to order
7 discovery. You have the obligation to ensure that the
8 victims' rights were protected, and neither Boeing nor the
9 government mentioned that provision in their briefs.

10 So I would take it that's an undisputed point
11 that's part of ensuring the crime victims' rights,
12 protections of the victims' families, you would look at all
13 the information.

14 In addition to that, the CVRA, perhaps
15 anticipating recalcitrant prosecutors, have directed that
16 the Justice Department shall, "Make its best efforts to see
17 that crime victims are notified of and afforded the rights
18 described in the CVRA."

19 How can the Justice Department make its best
20 efforts to enforce the CVRA when it's withholding
21 information that would help the victims prove their point?
22 And we've cited some authorities that we think lead to that
23 conclusion.

24 Your Honor is well familiar with the Brady Rule.
25 If my clients had committed a murder or something like that,

1 the government would have to give them lots of information.

2 But the victims' families are innocent victims
3 trying to protect statutorily created rights, and the
4 government is taking up the position that they don't have to
5 turn over information.

6 Although it's curious, the government says, "We
7 agree" -- this is a quote from their brief, "The government
8 forthrightly acknowledges that the victims' families deserve
9 to be treated with fairness."

10 How can it possibly be fair for the government to
11 withhold information that is directly on point for the
12 factual issues that are before this Court?

13 And in addition, as your Honor is well aware, and
14 I'm sure the government attorneys are well aware, there are
15 duties of candor to the Court. We laid that out in our
16 brief. The government didn't explain how they were going to
17 discharge their candor-to-the-Court obligation while they're
18 withholding information.

19 So we think if your Honor reaches issues that
20 involve factual disputes, you would simply enter an order to
21 the government requiring them -- we've spelled out the kinds
22 of information we're looking for.

23 We're not seeking to rummage through their files.
24 We have particular points of interest, and they could turn
25 over the information on those points of interest. So that's

1 our second motion which you should grant, in our view, if
2 the Crime Victims Rights victim status is disputed.

3 So now we have -- again, with the Court's
4 permission, I would move on to our third motion, which we've
5 identified as the supervisory power motion. And let me sort
6 of break the argument here into two pieces.

7 What parts of the DPA should you be examining
8 closely or supervise? And then, if there are aspects that
9 should be examined closely, does the Court have the
10 authority to do that?

11 So the first point, what should you be
12 scrutinizing? Well, there's an astonishing provision in the
13 DPA that says, "The following senior management had nothing
14 to do with the crimes." It's one sentence that's in there.
15 Why?

16 There's no explanation for why they would put that
17 in there. They don't ordinarily do that. I'm assuming that
18 the government confirmed that they didn't put senior
19 management under oath before reaching that conclusion. So
20 what is going on with that provision?

21 What is going on with the rest of the DPA? We
22 were just discussing, does it cover manslaughter or not?
23 Ordinarily, the government is very precise about which
24 crimes are covered and which defendants are being protected
25 from prosecution. Not in this case.

1 And that would be something that I think may
2 inevitably embroil the Court in disputes. So you should
3 supervise the DPA right now and ask the government, what
4 crimes are covered and what people are covered? That
5 doesn't seem like an unreasonable proposition.

6 In addition to that, as I've just explained, the
7 government seems to concede they have not consulted with the
8 victims before entering into this DPA.

9 If your Honor has supervisory power, one of the
10 things you could say is, I'm going to supervise these
11 proceedings and at least make sure that these families have
12 an opportunity to talk to you before you put a DPA on my
13 docket and expect me to sign off on it.

14 None of that information, by the way, was
15 disclosed to your Honor when the DPA was filed. They never
16 told you anything about failure to consult with the victims.

17 And finally, we were pleased to see, again,
18 Senator Cruz filed an amicus brief last week explaining that
19 he thinks there are some aspects of this case that need to
20 be supervised and scrutinized very carefully.

21 One of the things that Senator Cruz highlighted,
22 that I hadn't really thought about before was, we have
23 Boeing sending reports over to the government every three
24 months about how they've supposedly cleaned up their act.
25 That would be great, if they've cleaned up their act.

1 But why is that process happening secretly,
2 without the victims' families or the public able to see
3 what's being transmitted between the government and Boeing?

4 There's no explanation for why that has to be done
5 secretly. I think Senator Cruz has asked you to take a good
6 look at that provision.

7 And perhaps maybe there are some commercial trade
8 secrets or some items, as part of the disclosure, that would
9 have to be redacted or something, but why can't the rest of
10 that process be done publicly and transparently? So those
11 are the aspects of the DPA that we think should be
12 scrutinized carefully.

13 The next question is, all right, do you have the
14 authority to scrutinize the DPA carefully? The answer is
15 yes. The Speedy Trial Act very clearly gives this Court
16 authority to scrutinize these kinds of agreements and we've
17 cited the relevant provision in our briefs. It's
18 3161(h)(2).

19 And it says that the government can execute a DPA
20 "pursuant to a written agreement with the defendant, with
21 the approval of the Court."

22 So there's that language, "with the approval of
23 the Court." This is 3161(h)(2). 3161(h)(2)., "Pursuant to
24 a written agreement with the defendant, with the approval of
25 the Court."

1 So now there's that language "with the approval of
2 the Court." The question then becomes, what is "with the
3 approval of the Court" referring to?

4 And here we rely on the Scalia/Garner treatise on
5 statutory construction, which we think has the relevant
6 canon of construction. You would use what they refer to as
7 the nearest-reasonable-referent rule.

8 "With approval of the Court" refers to what?
9 Written agreement. So the question then becomes whether
10 this Court would approve the written agreement.

11 Now, what's interesting -- that's our argument we
12 laid out in our briefs. And what did the government say?
13 They didn't even cite that provision in their response, much
14 less dispute our interpretation of that provision. So we
15 think you have essentially undisputed argument on that
16 point.

17 Unless you want to let Boeing jump into the fray
18 here. Boeing says, well, wait a minute. There's some cases
19 here that we think indicate that your Honor should not be
20 scrutinizing this agreement carefully.

21 They cite Fokker Services, the D.C. Circuit case
22 from 2016, but that case was in a very unusual factual
23 posture. In that case, the district court judge said, hey,
24 I'm disagreeing with what the prosecutors are doing here.
25 They should have filed different charges.

1 It goes up to the D.C. Circuit, which says, wait a
2 minute. You can't decide which charges should be filed. Of
3 course, we're not making that argument here. We're making
4 the argument we want to discuss with the prosecutors what
5 charges to be filed, acknowledging that they ultimately have
6 discretion which charge they would finally file.

7 So we are in a totally different posture here.
8 But in addition to that, Fokker rested on D.C. Circuit
9 precedent which said that, in the D.C. Circuit, trial court
10 judges cannot reject a plea bargain because they're too
11 lenient. That's obviously the law of the circuit there in
12 the D.C. Circuit.

13 In this circuit, the law is different. In this
14 circuit, and we've cited four cases: Bean, Miles, Merritt,
15 and Cheever. The Fifth Circuit has repeatedly held that you
16 can look at a plea agreement, and say, hey, this is just too
17 lenient. I'm not going to sign off on it.

18 Against that premise, Fokker is not controlling,
19 because it doesn't rely on Fifth Circuit law which is
20 contrary to the premise that they have there. We've also
21 noted that the Court would have some inherent power in its
22 docket as well to look over this.

23 It's interesting when you hear what the government
24 is trying to present to you this morning. They're saying,
25 oh, you don't have authority to do this. They have, for

1 decades, taken a different position.

2 And we've cited, I think, an excellent article
3 that I would call to your attention. This is from Professor
4 Peter Reilly, who's right here at Texas A&M Law School,
5 published in, I'm proud to say, the Utah Law Review.

6 And that article collects a number of examples of
7 the government saying, of course the Court can reject a DPA,
8 just as it can reject a plea bargain or other types of
9 agreements.

10 So maybe the government, when they stand up today,
11 they can discuss this issue in their briefs, but they can
12 explain why they're taking a different position in front of
13 you than they've historically taken for, I think, several
14 decades to the contrary.

15 And likewise, Senator Cruz's amicus brief, once
16 again, I think, highlights the fact that this Court would
17 have authority to understand the principles of inherent
18 power to review a document that's been put onto its docket,
19 to review an agreement that requires, you know, approval, to
20 make a determination of whether that's appropriate. So we'd
21 ask you to rule in our favor on that motion as well.

22 Again, I hope I'm not treading on the Court's
23 patience here, but I would like to then move to our --

24 THE COURT: Yes.

25 MR. CASSELL: -- our fourth motion is what I would

1 call the arraignment and conditions-of-release motion. And
2 it rests on a simple premise. I was standing in the hall
3 this morning watching defendants in shackles going down, I
4 think to your magistrate judge, I think for an arraignment.

5 It looked to me like some of them didn't have as
6 many attorneys as Boeing has here this morning. That's what
7 they had to do. But Boeing comes with a team of lawyers,
8 and with the agreement of the government, and avoids going
9 to a public arraignment like every other criminal defendant
10 in America. That's not right. And that violates the law.

11 It violates Federal Rules of Criminal Procedure
12 10(a), which says, "An arraignment must be conducted in open
13 court."

14 I mean, I think I could almost sit down at this
15 point because the plain language of the rule says "must be
16 conducted." So our position is simple: You must conduct an
17 arraignment of Boeing, and it must be done in open court.

18 Now, what does the government say about this?
19 I've read their brief four or five times. I can't quite
20 tell what they're saying, because they never come out and
21 directly say what they mean.

22 I think, and it will be interesting to hear what
23 they say this morning, are they agreeing that Rule 10(a)
24 requires an arraignment?

25 There are passages in their brief that seem to say

1 that, but then they say, well, it doesn't appear that it
2 happens within any particular time. It's true that
3 Rule 10(a) doesn't say you have to do it within 14 days or
4 something, but clearly there would be a rule of
5 reasonableness. At some point, the arraignment has to be
6 held.

7 We've cited Rule 2 which says that the federal
8 rules must be interpreted to eliminate "unjustifiable
9 delay."

10 At this point, we've had Boeing not arraigned for
11 a year. That's without any justification. That is, by
12 definition, unjustifiable delay.

13 So then the only remaining question is is the
14 victims' position correct on how to interpret Rule 10(a)?
15 It's interesting, the government cited the Wright and Miller
16 Treatise, a very well-regarded treatise.

17 When you look at the treatise, the treatise says
18 that the rule "Does not authorize the defendant to waive the
19 arraignment itself." So even the government's own source,
20 Wright and Miller, says you can't waive the arraignment.

21 What is Boeing's position? Boeing's position is,
22 okay, that language, yeah, it's mandatory language. All it
23 means is, if you have an arraignment, it has to be in open
24 court, but that's not what the rule says. The rule says
25 must be conducted in court," an arraignment.

1 It's interesting they cite the rules on jury
2 trials. And they say, look, you don't always have to have a
3 jury trial and that's true.

4 When you look at Rule 23 in the federal rules,
5 here's what it says, "If the defendant is entitled to a jury
6 trial, then the trial must be in front of a jury," so on and
7 so forth."

8 That's not the way Congress ruled -- I'm sorry,
9 the courts wrote in 10(a)., they said there must be an
10 arraignment conducted. That's in Rule 10(a).

11 If you go to the adjacent position in 10(b), 10(b)
12 says the defendant can waive their appearance at the
13 arraignment, but only in certain unique circumstances that
14 aren't present here.

15 And then, if you go from Rule 10(b) to the
16 advisory committee notes under 10(b), it says that, "It's
17 important to note that this rule does not permit the
18 defendant to waive the arraignment itself which may be a
19 triggering mechanism for other rules."

20 As your Honor is well aware, when somebody is
21 arraigned, then what happens? Okay. We have to figure out
22 what are the conditions of release? Don't have a firearm.
23 Don't talk to victims. Don't commit any new crimes.

24 Boeing has connived to get out of all those
25 standard conditions that other defendants walking in the

1 courthouse this morning are going to have imposed on them
2 once criminal charges have been filed.

3 If there were any doubt on this point, again, we
4 have Fifth Circuit authority right on point, U.S. vs. Moore,
5 Fifth Circuit, 1994, discussing the issue of whether -- this
6 is just whether the defendant can sign the waiver of
7 indictment form ahead of time.

8 And the Fifth Circuit says, well, it's okay to
9 sign the form ahead of time, but in the interest of
10 transparent justice and everyone understanding what's going
11 on, the defendant has to acknowledge that signature in open
12 court.

13 So we think there's no doubt that this Court has
14 to arraign Boeing. And the government says, okay, but, you
15 know, it's not going to make any difference to anything.
16 That's simply untrue.

17 Because once Boeing is arraigned, as a standard
18 condition of release, this Court will impose, under 3142(c),
19 that Boeing shall not commit any new crimes.

20 Now, where does that become significant? Because
21 if Boeing were to commit new crimes, then your Honor would
22 have the ability, as you know from supervised release and
23 other violations that you routinely handle, to say, wait a
24 minute. I better put some additional conditions here to
25 make sure the public is protected.

1 You've been deprived of that power because of this
2 maneuver between Boeing and the government, because they
3 said, we've engineered all this in our own little private
4 agreement. That's not the way the rules work. That's not
5 the way the criminal justice system in this country works,
6 and Boeing should be subject to the same rules as everyone
7 else.

8 So you should hold an arraignment. And at that
9 arraignment, by the way, the victims would have a right to
10 be heard on conditions of release. I can tell you that some
11 of my victims' families will come in and explain to you
12 appropriate conditions that they think should be placed on
13 Boeing so you could have that information as part of your
14 decision-making process. Again, the victims' families
15 understand the final decision will be up to you.

16 But what's happened in this case is the ordinary
17 rules that apply in any other criminal case have been
18 circumvented and they've been deprived of that opportunity.
19 So we would ask you to grant our fourth motion for that
20 reason as well.

21 THE COURT: Very good. Let me ask you a few
22 questions.

23 MR. CASSELL: Yeah.

24 THE COURT: And first, just kind of a basic
25 question that maybe you can help me with, but you talked

1 about the hearing that you had in Florida where the district
2 judge told you he'd have a hearing and determine if the
3 victims in the Epstein crime had been deprived of their
4 rights under this, then the judge would take certain action.

5 What is the chronology or the time line of that
6 event and these appeals that you had from -- was it from
7 that district judge in the In re Wild case?

8 MR. CASSELL: Right.

9 THE COURT: Where the Eleventh Circuit, in a bit
10 of a split decision --

11 MR. CASSELL: Yes.

12 THE COURT: -- said they weren't crime victims
13 because of the timing?

14 MR. CASSELL: Yes.

15 THE COURT: Are those related?

16 MR. CASSELL: So we're now going to summarize a
17 13-year litigation saga which is all, by the way, covered in
18 an excellent law article in the Michigan State Law Review
19 that I published last year. So if you're interested in
20 that --

21 THE COURT: I didn't read that, but I read the
22 In re Wild cases.

23 MR. CASSELL: Yeah, here's what happened.
24 Nonprosecution agreement cut with wealthy defendant, Jeffrey
25 Epstein, done in secret. Victims find out. My colleague

1 Brad Edwards and I filed similar motions to what you see
2 here, saying, wait a minute. You have to confer with the
3 victims.

4 The government says, well, we don't think we had
5 any obligation to confer. So we reject -- you know, we
6 oppose your motions.

7 And Judge Marra said, well, wait a minute. I got
8 to figure out what the facts are. Did you confer? Did you
9 not? How did it work? He said, I am the inherent
10 fact-finding authority. I'm going to order some
11 fact-finding.

12 So he ordered fact-finding in I believe it was
13 2011. So the day before the government is supposed to
14 produce its facts, it files a motion to dismiss. You can't
15 award a remedy, Judge. You shouldn't do fact-finding
16 because there's never going to be a remedy at the end of the
17 day. We say, oh, yes, there's going to be a remedy at the
18 end of the day, advancing arguments similar to the ones I
19 just advanced to you.

20 And in 2013, Judge Marra ruled that the victims
21 have identified a meaningful remedy, setting aside the
22 pieces of a nonprosecution agreement, blocking Epstein's
23 prosecution as a prelude to the unfettered exercise of the
24 conferral rights. That was 2013.

25 Epstein goes up to the Eleventh Circuit in 2014,

1 says, wait a minute. There's a plea bargaining privilege.
2 You can't look at the documents. Eleventh Circuit rejects
3 it. Back down to Judge Marra.

4 Then we got our discovery from the government. We
5 file, in 2015, a motion for summary judgment that the CVRA
6 has been violated. And in 2019, Judge Marra rules in our
7 favor, granting summary judgment. The government failed to
8 confer with the victims, cites In re Dean, and some other
9 cases I'm citing here today, saying you had to confer with
10 the victims. So that was in February of 2019.

11 And he says, now that I've determined that there's
12 been a violation of the CVRA, now I want to know what the
13 remedies are. So he directs briefing on remedies. So we
14 file briefs, Epstein files briefs, government files briefs.
15 I thought we had some great briefs in there.

16 And then Jeffrey Epstein was arrested in July of
17 2019 and committed suicide, apparently, in August of 2019.
18 And at that point, in September of 2019, Judge Marra says,
19 well, Epstein is dead. So sorry, Professor Cassell, you've
20 been here 10 years, but I can't do anything for you. Throws
21 the case out as moot.

22 We then go up to the Eleventh Circuit saying the
23 case is not moot, because we are also seeking invalidation
24 of the co-conspirator immunity provision in the NPA,
25 Ghislaine Maxwell, and others. So the case isn't moot with

1 respect to that.

2 So we filed our brief on that. And then the
3 government comes in, and says, that's all very interesting,
4 but we don't think the CVRA applied in this case because we
5 never filed charges. This was a nonprosecution agreement.
6 There were some state proceedings, but there was never a
7 federal docket entry, never a federal charge in this case.

8 And, in fact, our CVRA case was opened up under
9 the court's civil docketing authority in Case No. 123, civil
10 number.

11 So they make that argument. They win 2-1 in front
12 of the Eleventh Circuit. We then get the hearing en banc,
13 and we lose 8-5 in the Eleventh Circuit en banc on that
14 issue.

15 Now, as you know from our briefs, the Eleventh
16 Circuit dropped footnotes in both the panel and the en banc
17 decision, saying, look, we're not reaching some other issues
18 here, like what would happen if the victims came in to an
19 ongoing criminal case, see *In re Dean*.

20 So the Eleventh Circuit was trying to avoid a
21 circuit split by saying, we're not disagreeing with what *In*
22 *re Dean* said. We're just saying, whenever there's not a
23 federal charged filed, then you don't have a right to go
24 into court.

25 We go to the Supreme Court. They deny the

1 circuit. The key point of all that is the Eleventh Circuit
2 en banc, which the footnote cited in our brief, specifically
3 says we are not contradicting In re Dean.

4 Of course, if you were to look at the
5 Eleventh Circuit precedent, you have to give more weight to
6 the Fifth Circuit precedent that's controlling here.

7 THE COURT: Let me ask you about setting aside the
8 provisions. In this circuit, a plea agreement, I can reject
9 a plea agreement because it undermines the purposes of
10 sentencing or the guidelines or -- as long as I'm specific
11 in why I'm rejecting the plea agreement, I can do that.

12 But I don't understand that I can weigh in and say
13 specifically what I think it should be, then I will be
14 reversed, mandamused, reversed, and the case would be
15 reassigned from me.

16 And so when you say that I should look at this DPA
17 and say the senior management shouldn't be in here or amount
18 paid into the fund should be higher or whatever, why would I
19 look at this different than I would a plea agreement?

20 MR. CASSELL: So we think you would look at it the
21 same way. Let me see if I can unpack what the examination
22 would look like. So remember, we have two objections that
23 are to the DPA. One is procedural. You could look at that
24 and say, well, my goodness, you haven't conferred with the
25 victims. I'm not going to approve the agreement until you

1 have meaningful conferral with the victims.

2 And that wouldn't require you to second-guess
3 anything about any of the provisions in the DPA, the
4 procedural point.

5 We think, in addition, and I think Senator Cruz
6 also agrees with us on this point, that you have an ability
7 to substantively look at those provisions. You could say
8 there's an exoneration provision for senior management.
9 That's very unusual. I don't see any justification for
10 that. I don't see any support for that. I have questions
11 about that. So I'm not going to approve the agreement based
12 on what I'm seeing here today. I want some more information
13 on that.

14 Or another provision, the government has trumpeted
15 in its press release, we got 2.5 billion out of Boeing.
16 That's a misleading statement. Boeing was obligated to pay
17 a majority of that money contractually, but the government
18 wanted to take credit for it.

19 You could look at that and say, this looks
20 misleading. I have questions about it. I'm rejecting the
21 agreement because it doesn't seem to be explained here
22 what's going on.

23 I think that would be the type of thing you would
24 do with a plea agreement. Say, look, I have questions here.
25 I see that I'm stipulating to some facts or some things that

1 aren't covered. Can you all go back and take a look at
2 those issues?

3 They might come back and say, well, here's the
4 same thing or a little more explanation. So we're not
5 asking you to do a red line of the DPA or something like
6 that. We're asking you to simply reject the provisions
7 we've identified for the reasons I've identified.

8 THE COURT: So would I reject the provisions or
9 would I reject the agreement as a whole?

10 MR. CASSELL: You would reject -- you could do
11 either. I would think you would reject the agreement based
12 on the provisions that were problematic.

13 THE COURT: Okay.

14 MR. CASSELL: And then ask the parties to come
15 back in front of you. By the way, if you did that, that
16 then, presumably, we would hope, as part of your order, you
17 would order the government to confer with the victims, and
18 then that would take care of the procedural piece as well.

19 THE COURT: Right. Right.

20 If I were to say, \$500,000,000 into this victims'
21 fund -- I think \$500,000,000 into this victim fund is
22 inadequate, it would then be improper for me to say -- would
23 it be improper for me to say, if I have an evidentiary
24 hearing and you were able to establish that \$1,000,000 is
25 appropriate, would it be improper for me to say \$500,000,000

1 is inadequate. I'm going to set this aside, unless you put
2 in what the evidence shows should be \$1,000,000. Would that
3 be improper for me?

4 Would I be intervening into the plea negotiations?

5 The reason I bring that up is out of this
6 Division, the Fifth Circuit has reversed a mandamus of a
7 judge out of this very Division, several times, for
8 improperly interfering in what is outside the purview of the
9 judicial domain, that is, intruding on the Executive
10 Branch's decisions.

11 MR. CASSELL: Right. Well, I probably should take
12 a look at some of those cases, because I don't think Boeing
13 or the government has cited these.

14 THE COURT: It's out of the Fort Worth Division,
15 so I am aware of them, and I try to be sensitive to them.

16 MR. CASSELL: I think with not knowing the
17 specifics of those cases, it may be a situation where the
18 judge says, I want you to do 10 years, not five years. I
19 think the Fifth Circuit then might properly say, well, wait
20 a minute --

21 THE COURT: Right.

22 MR. CASSELL: -- that's not really up to you.

23 But what is quite clear in the Fifth Circuit we
24 cited is you could look at five years. My goodness, that's
25 too low. I'm rejecting this agreement. You all come back

1 with something else.

2 THE COURT: I see. Okay.

3 MR. CASSELL: It's that formulation we would ask
4 you to adopt.

5 THE COURT: Okay. Very good.

6 Let me ask you another question while you're here.
7 Explain to me your take on the In re Dean case, because the
8 In re Dean case actually denies mandamus relief.

9 And so the three elements -- they talk about the
10 three elements that you had to prove to get mandamus relief.
11 They don't address the first two elements because they
12 decide under the prudential element, the third element, that
13 under the unique circumstances of that fact pattern, they
14 were going to deny a mandamus writ. So why don't you just
15 explain to me your take-away --

16 MR. CASSELL: Sure.

17 THE COURT: I mean, I've read the case. I
18 understand the facts.

19 MR. CASSELL: Yes.

20 THE COURT: And I've read the underlying opinion.

21 MR. CASSELL: Yes.

22 THE COURT: Judge Rosenthal's opinion as well.

23 MR. CASSELL: Yes.

24 THE COURT: It's a very long, detailed opinion.

25 MR. CASSELL: Sure.

1 THE COURT: So explain to me what happened in that
2 opinion.

3 MR. CASSELL: So again, there's going to be two
4 parts to my answer, a procedural part touching on the
5 mandamus issue, and then the substantive part, Judge
6 Rosenthal on remand.

7 THE COURT: Let me stop you there. I didn't read
8 any opinion she wrote on remand.

9 MR. CASSELL: Right.

10 THE COURT: I didn't know if you said -- I didn't
11 want you to think I read that. I read her initial
12 opinion --

13 MR. CASSELL: Yeah.

14 THE COURT: -- that you appealed or that you
15 mandamused.

16 MR. CASSELL: Right.

17 THE COURT: And there was an intervening order,
18 and then Judge Elrod, Judge Smith, and someone else.

19 MR. CASSELL: Yes.

20 THE COURT: That's all that I've read.

21 MR. CASSELL: Okay. Well, I was there, so --

22 THE COURT: Yeah.

23 MR. CASSELL: -- so let me see if I can explain
24 how it unfolded, because we think it's obviously controlling
25 precedent here and an important precedent here.

1 So the government and a wealthy defendant cut a
2 deal, do it in the dark of night, and then they present it
3 to the judge. Eventually, Judge -- I think it's Judge
4 Rosenthal at this point -- there was some reassignment
5 going on.

6 THE COURT: Yes.

7 MR. CASSELL: -- says, well, we think it had to be
8 kept secret for various reasons.

9 We go up to the Fifth Circuit on mandamus. The
10 Fifth Circuit initially grants -- that's the initial order
11 that you were talking about -- grants a stay for proceedings
12 which is, in essence, granting the mandamus provision.

13 THE COURT: For the 72 hours? Because they have
14 to rule within 72 hours under the CVRA?

15 MR. CASSELL: Right. But as I recall they, by
16 agreement of the parties, extended the time period.

17 THE COURT: Okay.

18 MR. CASSELL: And where this becomes important is
19 that was a 2008 decision where, as a victims' attorney, I
20 was operating under the burdensome mandamus standard.

21 In 2015, Senator Feinstein, Senator Cruz and
22 others voted for an expansion of the CVRA to change the
23 mandamus provision and give victims ordinary appellate
24 review.

25 THE COURT: Okay.

1 MR. CASSELL: I think that's one thing that needs
2 to be taken off the table. Today these families are
3 entitled to the same appellate protection as any other
4 litigant would have.

5 Back then we were working under mandamus which, as
6 you know, has the three prongs and it's difficult to
7 satisfy.

8 So the Fifth Circuit sends it back to Judge
9 Rosenthal. Big, long, evidentiary hearing, 120-page
10 opinion, as Judge Rosenthal is famous for writing, rejecting
11 our argument that she would have done anything different if
12 there had been an opportunity to present to the judge.

13 In that case, we were arguing that there had been
14 no opportunity to be heard on the plea bargain before it was
15 accepted. And so Judge Rosenthal said, well, you know, I've
16 looked at this, and here's some reasons why this is a good
17 outcome and so forth.

18 So that case, it's quite -- and the other thing
19 I'm sure you recall reading in the In re Dean decision, I
20 think it's the last paragraph, the Fifth Circuit says, we
21 are confident that the district court judge will figure out
22 a way to vindicate the rights of the victims.

23 And what happened in that case is the victims did
24 get a chance to come into court, did get a chance to present
25 to the judge, make the objections to the plea bargain so

1 their rights were protected.

2 We're asking you to do, in this case, the same
3 thing that Judge Rosenthal did there to vindicate the rights
4 of these families, but the right we're asking to have
5 vindicated is a chance to talk to these prosecutors at a
6 time when it's not just window dressing or meaningless
7 discussion, when they can truly make a difference in the
8 outcome of the case.

9 And your Honor has the power to do that if you
10 simply do what Judge Marra did in 2013 in the Jeffrey
11 Epstein case.

12 THE COURT: Okay. And if I can just follow up on
13 that. And so, just in terms of the posture of that case,
14 I'm just trying to understand in the Houston case, the
15 In re Dean case, which was the Texas City explosion --

16 MR. CASSELL: Yes.

17 THE COURT: -- BP?

18 MR. CASSELL: BP.

19 THE COURT: Yeah. They had already reached a plea
20 agreement. So the government reaches a plea agreement
21 because they asked to do that without conferring with the
22 victims in a sealed request.

23 MR. CASSELL: Yes.

24 THE COURT: That's granted. They reached a plea
25 agreement with British Petroleum. They reached the

1 agreement with British Petroleum, then file it, then unseal
2 it, and then provide the notice, and then you all get
3 involved.

4 MR. CASSELL: Yes.

5 THE COURT: And the case ultimately gets assigned
6 to Judge Rosenthal, and then she issues an order either
7 saying they weren't victims or saying they were victims.
8 But she would do the same thing, all that she says, you take
9 it up to the circuit, the circuit says they're victims. It
10 shouldn't be sealed. 200 is not too many to notify.

11 This is what Congress intended, even if it does
12 make bargaining harder. In fact, the purpose is to make
13 bargaining harder.

14 MR. CASSELL: Right. Yes.

15 THE COURT: And then they deny mandamus relief and
16 say they're confident that Judge Rosenthal will vindicate
17 the rights. But they don't order the plea bargain agreement
18 to be set aside so that those victims could then meet with
19 the prosecutors and express their views on it.

20 Are you saying that that subsequently happened
21 with Judge Rosenthal on remand?

22 MR. CASSELL: So I remember that there was a big
23 hearing that produced then a 120-page opinion about our
24 arguments and why, in Judge Rosenthal's view, they were not
25 sufficient to change the outcome. So we were heard. I

1 argued to Judge Rosenthal on remand.

2 And so my recollection is that our focus in that
3 case was not on a conferral right. Although, actually I
4 think we were focusing more on the plea agreement, trying to
5 get that set aside than we were on conferral, because we had
6 a done plea deal in that case.

7 THE COURT: Right. And that's what I was
8 wondering in terms of how it applies to this case. The
9 Fifth Circuit didn't direct that the plea agreement be set
10 aside, at least in the opinion, that it specified in the
11 opinion. It may have. And what I'm saying is it could have
12 happened on remand. It sounds like it didn't.

13 MR. CASSELL: Right.

14 THE COURT: And as it relates to this case, in
15 terms of how In re Dean would apply in this case, why would
16 I set the agreement aside consistent with what In re Dean
17 directed?

18 MR. CASSELL: Right. And the answer is because we
19 are asking for an opportunity to confer about an agreement
20 before it becomes finalized.

21 Whereas, in Dean, we were asking to have the
22 agreement itself set aside. I think it's interesting, I
23 keep coming back to Judge Marra's decision because I think
24 it's the one that's on point and it discusses the very
25 question that you're asking right now.

1 And what Judge Marra said and, you know, frankly,
2 perhaps our arguments were more refined in 2013, my
3 arguments were better presented in 2013 than they were
4 in 2008.

5 In 2013 we said to the judge, look, the CVRA
6 promises these victims an opportunity to have reasonable --
7 a reasonable right to confer.

8 And that must be a meaningful right to confer. So
9 if you say, come on in to the prosecutor's office, and it's
10 still a done deal, that's window dressing. That's going to
11 add insult to injury.

12 The only way I can protect the right to
13 meaningfully confer is to set aside those provisions and
14 give the victims an opportunity to go in and convince the
15 prosecutors to do the right thing.

16 He cites In re Dean. He actually cites one of
17 Judge Rosenthal's -- I can't remember if it was the earlier
18 one or later one. So he was very much aware of the Fifth
19 Circuit precedent trying to align himself with what the
20 Fifth Circuit precedent required.

21 The other point to be made about the Fifth Circuit
22 is they were trying to clean up a mess. They were trying to
23 clean up a violation of CVRA that had already occurred and
24 that the district judge had essentially ratified and they
25 had to step in on appeal and I think we're --

1 THE COURT: We're in a similar posture here. The
2 error really is mine, on top of the government's argument.

3 MR. CASSELL: Here's the difference. You are here
4 today and you can fix the problems.

5 THE COURT: Right. Right. No, I understand.
6 But, I mean, we're here now because I didn't -- the irony of
7 all of this is that, in my Rule 11 notes, I always and have
8 always asked if there's been a notice under 3771 and an
9 objection under 3771.

10 MR. CASSELL: Right.

11 THE COURT: Because I was on the Senate staff when
12 this was all passed, so I knew coming in --

13 MR. CASSELL: Right.

14 THE COURT: -- to this appointment to do that.

15 But here there's no Rule 11. I don't have that.

16 MR. CASSELL: Yeah.

17 THE COURT: I don't even take arraignments. I
18 don't have a Rule 10 checklist.

19 MR. CASSELL: Well, I hope you won't think I'm
20 pandering, but let's put the blame squarely where it
21 belongs. It belongs on the Justice Department. They should
22 have told you what was going on. They concealed that
23 information and so here we are today.

24 THE COURT: Right. Right. And all I'm saying is
25 I should be more -- the irony is I should be more cognizant

1 of it in this context, but I don't take this. I don't get
2 deferred prosecution agreements.

3 MR. CASSELL: Right.

4 THE COURT: Which really hurt my feelings here.
5 When you wonder why, in footnote six, they wouldn't file in
6 the Fort Worth Division. What division would be better?

7 MR. CASSELL: The reputation of this Division
8 precedes itself. That's clearly the highest quality of
9 justice. And that's why my clients are very confident that
10 they're going to get a favorable outcome here shortly.

11 THE COURT: Okay. Just the last question, and
12 then we need to hear from the government and from Boeing,
13 but the last question I have is the senior management
14 argument.

15 So is it your take that the statement in the
16 statement of facts or the DPA, wherever it is, that says
17 that the senior management of Boeing, I would have to look
18 at the quote, but there's no evidence that senior
19 management -- this has persisted among the senior management
20 at Boeing, or whatever they said.

21 So your take on that is they've been immunized or
22 that the government has agreed to not prosecute them based
23 upon that line?

24 MR. CASSELL: Essentially, yes. But it's a very
25 unusual provision. We've cited some commentators who said

1 they've never seen anything like this around the country.

2 So I don't want to overstate our case.

3 That's not an immunity provision. I'm using the
4 term loosely. It's not a provision that says, we are flatly
5 precluded from prosecuting senior management. But you can
6 imagine what a jury trial would look like if they tried --
7 if a prosecutor tried to prosecute senior management.

8 Defense Exhibit 1 would be that statement and the
9 case would be over. So it effectively prevented the
10 prosecution of senior management, which is why I'm sure
11 Boeing was pushing so hard to get that provision in there.

12 And why it's just so surprising that the
13 government would do that, without, as far as we understand
14 it, putting senior management under oath and asking them,
15 were you involved in this crime?

16 I mean, if they had done that, they said, well,
17 okay, that seems like a reasonable explanation, I suppose
18 you can do that. But they just threw that in there, without
19 precedent and without investigation, and we think that
20 that's a provision that deserves careful scrutiny from this
21 Court.

22 THE COURT: Last question, and I promise. The
23 Supreme Court recently, at least twice this term, has
24 cautioned judges, district judges to not impose remedies in
25 cases where the statutory language does not authorize that.

1 SB 8, the employment case announced last week or
2 two weeks ago.

3 MR. CASSELL: Right.

4 THE COURT: It was a 6-3 decision.

5 Is that admonition at play here as it relates
6 to 3771?

7 MR. CASSELL: No, for a couple of reasons. First,
8 the CVRA itself directs you to ensure that victims' rights
9 are respected. And so the victims' right to confer was not
10 respected in this case. Your Honor is obligated to enforce
11 that. And the way you do that is by setting aside the
12 provisions in the DPA, reopening them.

13 By the way, here again, Judge Marra has looked at
14 that very question and reached the same conclusion that we
15 are arguing for. The government made an argument similar to
16 what you just presented as a possibility and Judge Marra
17 rejected it.

18 One of the provisions he looked at, if I could
19 call your attention to it, it's 3771. It's 3771(d)(5). And
20 you notice there, there was a time limit of 14 days if a
21 victim's family is moving to reopen a sentencing or a plea,
22 14-day time limit.

23 But we're not moving to reopen a sentence,
24 obviously, and we're not moving to reopen a plea. We're
25 trying to get Boeing to have to plead guilty or not guilty

1 in an arraignment.

2 So the 14 days doesn't apply. I think the parties
3 really haven't contested that, but the implication there is,
4 okay, reopening of agreements is permitted. And here's
5 someone we're going to have put a 14-day time limit on, and
6 the others we are not putting a time limit on. That's
7 exactly what Judge Marra said, looking at this. The CVRA
8 does envision this.

9 If you were to rule to the contrary, you would be
10 violating the CVRA. You would be telling these families,
11 look, you didn't get a right to confer, but, hey, when we
12 wrote this thing, Congress wrote this thing back in 2004,
13 they didn't really want to have enforceable rights.

14 That was contrary to the very purpose of the CVRA.
15 It was designed to give family members like this enforceable
16 rights where judges like you could tell the prosecutors they
17 have to confer. Any other conclusion guts the CVRA and
18 makes it meaningless. Oh, we will be nice to crime victims
19 when it's convenient to everybody, but otherwise, don't
20 bother us.

21 So that's why we think that that line of precedent
22 from the U.S. Supreme Court is completely applicable. The
23 CVRA itself, textually, makes very clear that these
24 families -- and another provision, by the way -- well, first
25 (c)(1) says the government has to make its best efforts to

1 enforce the rights during the investigation.

2 But the provision I was thinking of was (d)(3).

3 (d)(3), which is the enforcement provision that Congress put
4 in there. "The rights described will be asserted in the
5 district court in which the defendant is being prosecuted."

6 So that's the Northern Division in the Northern
7 District of Texas. And it says that the victims can file
8 motions and the Court takes up and decides them. That's
9 what we've done here. We've filed motions saying enforce
10 our right to confer. That's properly in front of you under
11 the text of the CVRA.

12 We hope that you will grant our motion, set aside
13 the provisions that are preventing them from conferring and
14 give them an opportunity to convince the government to do
15 the appropriate thing here, which is hold Boeing criminally
16 accountable for its crimes.

17 THE COURT: Okay. Thank you.

18 MR. DUFFY: Thank you, your Honor. Good morning.
19 Jerrob Duffy for the United States.

20 Your Honor, the United States recognizes the
21 immeasurable losses suffered by the representatives of the
22 crash victims of Lion Air Flight 610 and Ethiopian Airlines
23 Flight 302. Nothing will ever make up for those losses.

24 The discrete legal issue to be decided here, your
25 Honor, is whether the movants are crime victims under the

1 definition set forth in the CVRA with respect to the crime
2 charged in the information.

3 The crime charged is a violation of 18 U.S.C. 371,
4 conspiracy to defraud the United States. Specifically, the
5 FAA AEG. And your Honor, of course, heard the evidence in
6 the trial about a month ago. I won't go over all the
7 evidence there but I will, in a moment, discuss some
8 of that.

9 For the reasons set forth in our brief and that I
10 will expand upon, the movants are not crime victims of the
11 crime charged under the terms of the statute because they
12 were not directly and proximately harmed by the charged
13 offense.

14 This does not mean that they are not victims of
15 the crashes or that, under a civil negligence, or some other
16 standard, that they did not suffer losses with respect to
17 the crashes. They surely did.

18 But the criminal case charged in the information
19 and defined by the statements of facts set forth in the DPA
20 do not encompass all of the facts and circumstances that led
21 up to the crashes: the design of the planes, the issues
22 related to information about MCAS that was disclosed to the
23 FAA on multiple occasions by Boeing engineers, the role of
24 foreign regulators, of the design issues and equipment and
25 other failures related to the crashes. They cannot, because

1 the government is and was constrained to investigate
2 potential criminal conduct using evidence that is reliable,
3 that can be admitted in federal court under the rules of
4 evidence, and be sponsored by federal prosecutors.

5 For any crime to be charged after these
6 determinations, the Attorney General and his designees must
7 then exercise prosecutorial diversion, whether such a
8 charge, even when they believe it can be proved with
9 admissible evidence beyond a reasonable doubt, should be
10 brought.

11 Here, the criminal case is much more narrow than
12 movants have argued. In fact, the Court heard the
13 evidence -- almost all of the evidence set forth in the DPA.
14 The Court heard that evidence during the trial against
15 Mr. Forkner. It took approximately three days.

16 The criminal case is defined by the charge set
17 forth in the information and is based on the facts as
18 admitted by Boeing and in the DPA statement of facts.

19 The criminal charge and facts that underpin that
20 charge do not establish that movants are crime victims under
21 the CVRA.

22 Further, your Honor, because the remedies sought
23 here by the movants are not available under the CVRA or were
24 not warranted, the motions should be denied.

25 Nonetheless, your Honor, as set forth in our

1 brief, the government apologizes for not meeting and
2 conferring with the crash victims' beneficiaries before
3 entering into the DPA, even though it did not have a legal
4 obligation to do so.

5 Even if such consultations would not have changed
6 the DPA, there is a chance that earlier consultation would
7 have provided these individuals with a chance to be heard
8 with respect to the case.

9 After the filing of these motions, the government
10 did meet with some of the movants on three occasions, the
11 third of which involved the Attorney General for the United
12 States.

13 The Department of Justice has committed and has
14 set forth in our filing to learn from this and other cases
15 when determining what revisions to its internal policies,
16 guidelines, and practices are warranted.

17 None of this, however, means that the DPA was
18 negotiated in violation of the CVRA. It was not. Under the
19 definition set forth in the CVRA, the movants are not crime
20 victims with respect to the charge, of 18 U.S.C. 371,
21 conspiracy to defraud the United States.

22 Your Honor, the government carefully investigated
23 and weighed the potential charges it could bring in this
24 case against Boeing and believed it could prove beyond a
25 reasonable doubt in federal court.

1 The evidence collected during the investigation
2 established, in the view of the prosecution, that only two
3 conspirators, the two who are described in the statement of
4 facts, were criminal participants in this conspiracy.

5 Let me reiterate that. The government's evidence
6 was that only two conspirators were criminal participants in
7 the charged conspiracy. Boeing Employee Number One, who's
8 been publicly identified by the United States in its
9 charging instrument as Mr. Forkner, and Boeing Employee
10 Number Two, another pilot who was, during most of the
11 charged conspiracy, more junior to Mr. Forkner, and who
12 later acceded to his -- the role of chief technical pilot.

13 Those individuals are described in the statement
14 of facts. This is important for many reasons with respect
15 to the CVRA analysis. Because the case, the criminal case,
16 the case that the United States believed, and ultimately did
17 bring in terms of the filed charged information was not and
18 did not encompass all of the events that have been publicly
19 described or that have been described by movants with
20 respect to the factors that led to the crashes.

21 Based on this assessment of the evidence, the
22 government prosecutors, supervisors, and senior officials
23 believe that the filed information, combined with the DPA,
24 was appropriate at the time this case was filed on
25 January 7th of 2021. The government's position remains that

1 it was appropriate.

2 The government's litigation position has not
3 improved over the past 16 months. As the Court well knows,
4 Mr. Forkner was acquitted on four counts of wire fraud, a
5 different charge, admittedly, than the charge set forth in
6 the information, but nonetheless involving almost all of the
7 same evidence.

8 Further, your Honor, with respect to the charged
9 offense, these two conspirators were relatively siloed
10 within Boeing. They were not informed by others in Boeing
11 about the expansion of MCAS at the time the expansion
12 occurred before coming upon it in a simulator test in
13 approximately November of 2016. They were not informed
14 internally.

15 They were not invited to the meetings that the
16 Court heard about with respect to Boeing engineers
17 describing and disclosing the expansion of MCAS to the
18 portion of the FAA that focuses on airworthiness and safety.

19 And other than the evidence that the Court heard
20 from Mr. Loffing, the government did not come across
21 credible evidence that Mr. Forkner or Boeing Employee Number
22 Two were provided affirmatively with information about the
23 expansion of MCAS or the other technical issues that later
24 came to light with respect to MCAS.

25 And these are important implications because, with

1 respect to the criminal conduct that the United States
2 believed it could prove beyond a reasonable doubt, it is
3 cabined by the facts it was able to gather and, your Honor,
4 that were set forth in the deferred prosecution agreement.

5 And now I would like to talk for a moment about
6 proximate cause as it relates to this. One moment. Your
7 Honor, to be considered a crime victim, a person or entity
8 must be directly and proximately harmed as a result of the
9 charged criminal offense.

10 These are two separate determinations. As was
11 described earlier and set forth in the government's brief,
12 in Fisher the stated harm -- the Court held that stated harm
13 must be based on the crime charged.

14 And most importantly, we think, as cited in
15 Fisher, the Sixth Circuit In re McNulty described the
16 factual basement premise for how to arrive at this
17 determination.

18 Because, again, we are living in a criminal -- a
19 criminal case context. A case where evidence has to be
20 collected in accordance with the rules and that the
21 prosecution can introduce into a criminal trial.

22 In In re McNulty, 597 F.3d at 351, the Court
23 described, "In making this determination we must, one, look
24 to the offense of the conviction based solely on facts
25 reflected in the jury verdict or admitted by the defendant;

1 and then, two, determine, based on those facts, whether any
2 person or persons were directly and proximately harmed as a
3 result of the commission of a federal offense."

4 That is the foundation for the analysis. It's not
5 what could potentially be proven on a preponderance basis
6 using civil discovery standards.

7 The ultimate harm, and the Fisher Court explained
8 that the causal nexus must be not too attenuated, at
9 640 F.3d 648, note seven. To consider whether it was a
10 direct causal connection, your Honor, the Fifth Circuit
11 explained in Fisher that the direct and proximate harm
12 language imposes dual requirements of fact -- of cause in
13 fact and foreseeability.

14 A person is directly harmed by the commission of a
15 federal offense where that offense is a but-for cause of the
16 harm. And for proximate causation, your Honor, the Fifth
17 Circuit explained that foreseeability is part of the
18 analysis, but United States against Salinas, 918 F.3d at
19 466, set forth in the movants' brief for the proposition
20 that there could be multiple but-for causes.

21 In that case, Salinas -- it was a sentencing
22 enhancement, so it was only but-for causation -- there was
23 no proximate causation. That was the alien-smuggling case
24 where an individual who was being -- in the back of a truck
25 had a heart attack when there was a high-speed chase.

1 But the Court went on to say, a proximate cause
2 inquiry would ask how directly each cause affected the final
3 outcome. How directly. So based on Fisher and Salinas, we
4 know that proximate cause incorporates both foreseeability
5 and directness of the causal connection between the charged
6 offense and the final outcome.

7 Further, as your Honor referenced in the BP
8 Products litigation, United States v. BP Products at 610 F.
9 Supp. 2d at 688, the Court said, "Proximate cause in a
10 criminal case presents a higher threshold for proof than
11 proximate cause in a civil tort case."

12 Your Honor, much was set forth in the discovery
13 motion of the movants with respect to all of the different
14 causal factors that they would bring to the table in terms
15 of establishing direct and proximate causation.

16 But we don't think that you have to go there. In
17 part because, by starting with the foundation of this
18 criminal case, that foundation is more limited. It's more
19 limited than was set forth in the letter from the amicus
20 that was filed, and it's more limited than was set forth in
21 the movants' filing.

22 Numerous factors would have to be considered in
23 order to ultimately get to a direct and proximate causation
24 finding here.

25 And ultimately, the idea that by creating or

1 providing information and then somebody else sort of
2 insinuating the Court, or even movants, into the decision as
3 to what crimes could be charged really runs afoul of the
4 provision in the CVRA that the discretion of the Attorney
5 General should not be undermined.

6 And I'll speak a little bit about the In re Wild
7 decision, the Eleventh Circuit's en banc decision in a
8 moment in response to a question the Court had, but we
9 disagree with the import of that case.

10 Our view is that In re: Wild called into question
11 everything that Judge Marra did. Because In re Wild
12 ultimately determined that the ancillary proceeding that was
13 the vehicle leading to all of those rulings was ultimately
14 not appropriate.

15 And so let me just speak a little bit about the
16 causal factors, not because the United States is here to say
17 these are all the causal factors and here's all the
18 evidence.

19 Rather, there are issues that came up at the
20 Forkner trial. There are issues that have been referenced
21 in the government's filings with respect to the crash report
22 from one of the crashes. The other crash report is an
23 interim crash report. And also, expert filings that were
24 made by Mr. Forkner in that criminal case.

25 But they relate to, ultimately, how remoteness

1 would be established here because we know that the criminal
2 conduct was focused on the FAA AEG, not all of the other
3 disclosures that took place with respect to the expansion of
4 MCAS. We know as well that the two conspirators here were
5 not informed about the issues that led to those meetings
6 with the FAA.

7 We also know that the lead person at the FAA AEG
8 who was most responsible for making the training
9 determination was invited to some of those meetings and that
10 she, you know, for whatever reason, did not go. Those go to
11 the scope of the conspiracy, your Honor.

12 With regard to -- but they also go to how much was
13 known and foreseeable to the two individuals that form the
14 basis of the conspiracy. Make no mistake, Boeing is
15 vicariously liable for the conduct of the conspirators, but
16 it has to be conspirators that act with criminal intent, not
17 with respect to all other employees at Boeing that had
18 nothing to do with the conspiracy.

19 Issues related to the conduct aimed at the
20 training levels for U.S.-based airlines, as opposed to
21 foreign airlines, communications with Boeing persons at
22 foreign-based airlines and foreign regulators, issues with
23 respect to the role of foreign regulators.

24 Issues related to the creation and design of the
25 737 MAX aircraft, to include product design of MCAS having

1 only one AOA sensor operating at a time. Its susceptibility
2 to failure.

3 The reliance on a single sensor to control and
4 engage MCAS, and the manner in which MCAS engaged and
5 reengaged. None of those issues, we submit, our evidence
6 established the conspirators were aware of.

7 Issues related to the immediately preceding Lion
8 Air flight prior to the crash flight, as referenced in the
9 crash report cited by movants, where the AOA sensor
10 improperly caused the MCAS system to engage and how that
11 crew landed that plane without flight simulator training.

12 Issues related to what flight simulator training
13 would actually have involved. Issues related to the service
14 of the bad AOA sensor on the first crash by a third-party
15 vendor. Issues related to the approval process. And so on,
16 your Honor.

17 I point these out -- and there are others -- I
18 point these out because the factual inquiry -- the factual
19 inquiry about the relationship between the crime charged in
20 this case and the ultimate outcome is substantial and it
21 involves so many issues, ultimately, even the movants'
22 construction took approximately 336 paragraphs to list out.

23 Now, we at the DOJ are not here to represent --
24 the Department of Justice -- that all of these, these are
25 the facts that occurred. We do not accede to the accuracy

1 of these crash reports. We do not necessarily embrace the
2 underlying facts that support these causal factors.

3 What we have done during the course of our
4 investigation is we have collected information, including
5 the crash reports, that show so many different factors that
6 create a separateness, that create a remoteness with respect
7 to the crime charged and the crashes.

8 We don't think that you have to engage in what I
9 think Judge Marra did, which is almost 10 years of
10 litigation. We don't think you have to do that because you
11 heard the evidence in the Forkner trial.

12 And the evidence in the Forkner trial dovetails
13 almost precisely, if not precisely, with the statement of
14 facts set forth in the DPA.

15 Now, I would like to address a couple issues with
16 respect to the DPA. I think that your Honor asked a
17 question or two about that.

18 Your Honor, the DPA does not work in the way that
19 the movants in the amicus claim. There is no liability
20 waiver for any individual. In fact, the DPA was filed in
21 January of last year and Mr. Forkner was indicted almost 10
22 months later. There is no -- as set forth in paragraph
23 20(b) there is no liability waiver for any individual.

24 Further, the release from liability for Boeing is
25 based on the conduct as set forth in the DPA, the statement

1 of facts, not for some broad array of potential federal
2 crimes that movants suggest.

3 It was more limited. However, the government did
4 not come across evidence that it believed to be prosecutable
5 during the course of its investigation to support those
6 broad array of federal crimes.

7 The statements in the DPA concerning the lack of
8 involvement in the criminal conspiracy by high-level
9 corporate officials, that's specifically at paragraph 4(h).
10 That goes to the facts and circumstances related to the
11 guidelines calculation.

12 We set that out in our DPAs regularly: Here are
13 considerations that we considered with respect to our
14 determination as to whether or not the DPA is an appropriate
15 outcome and the terms of the DPA. And moreover, they are
16 accurate.

17 With respect to the crime charged, we did not find
18 evidence of high-level involvement, of high-level corporate
19 officials in the criminal conduct. Movants' assertions in
20 this regard are incorrect.

21 Now, your Honor, I would like to address a couple
22 of the issues with respect to the other motions, but if you
23 have any questions on the CVRA motion itself, I want to
24 obviously --

25 THE COURT: Go ahead and finish it out.

1 MR. DUFFY: I would like to go ahead and talk
2 about In re Dean. You asked questions about In re Dean.
3 In re Dean is different in this case in multiple ways.

4 First, the government and the defendant in
5 In re Dean both agree that the victims in that case were, in
6 fact, crime victims of the crime charged.

7 That was acknowledged and that was assumed. The
8 government filed a motion to ask authority for delayed
9 notification. The court initially granted it. The Court of
10 Appeals ultimately determined that was improvident and
11 should not be granted.

12 The issue was not before the district court or the
13 Court of Appeals as to whether or not the crime victims --
14 excuse me, the movants in that case were, in fact, crime
15 victims.

16 And with respect to the concept here that the
17 Court or the movants would second-guess the government in
18 terms of its charging decision, we understand that there's
19 strong views. You know, we understand that too.

20 But the prosecutorial discretion in terms of
21 whether or not to bring a charge, that rests with the United
22 States. And the United States is charged to take care of
23 the laws that are faithfully executed.

24 I would like to address the ombudsman issue, your
25 Honor. First, the government apologizes to the movants and

1 other representatives of the crash victims that the
2 Department of Justice's ombudsman, in February 2020,
3 conveyed inaccurate information. That should have been
4 handled differently.

5 There was no deception. The construction of that
6 communication is not accurate. Individuals at the victim
7 rights ombudsman's office at the Department of Justice
8 reached out to others in the department.

9 They were not provided with accurate information
10 in order to make an accurate response to the representatives
11 of the crash victims.

12 That should have been handled differently. They
13 should have been provided with accurate information. When
14 the Department of Justice speaks about a matter, it should
15 speak accurately.

16 Often we don't comment on a nonpublic
17 investigations for various reasons. In this case, however,
18 the crash victims were not crime victims under the CVRA.
19 But nonetheless, when a response was provided, they should
20 have been provided with an accurate response, and for that,
21 we apologize. There was no intention to mislead anybody.

22 Your Honor, with regard to the motion for
23 supervisory authority over the DPA, I think that was the one
24 that your Honor asked several questions about a few moments
25 ago.

1 Let me start here by saying, in our view, the
2 crime victims do not have standing to do that, because
3 they -- excuse me, the movants do not have standing because
4 they are not crime victims under the CVRA.

5 But, moreover, we acknowledge that the Court
6 could, in its discretion, choose not to accept the DPA. We
7 acknowledge that. We don't think that that's warranted
8 under the facts of this case.

9 We recognize, as the Court just did, that on
10 January 24th, at docket entry 13, the Court made a finding
11 that exclusion of time under the Speedy Trial Act would be
12 appropriate, but we also -- you know, but we also recognize
13 that, you know, a deferred prosecution agreement is
14 different than a filed charge.

15 As the D.C. Circuit explained in Fokker -- and I
16 will talk about Fokker in a moment for a different
17 proposition -- but a deferred prosecution agreement is sort
18 of -- it's a middle ground.

19 It's a middle ground between a filed charge with a
20 guilty plea, as happened in In re Dean, or the BP case with
21 the explosion there, or a nonprosecution agreement or a
22 declaration.

23 And there are reasons and justifications for
24 engaging in DPA. There's a long practice of doing that and
25 it allows -- you know, it allows sort of a middle ground.

1 It allows the opportunity for a corporation or an individual
2 to show their good conduct. And ultimately, at the
3 conclusion of the DPA, if its terms are successfully agreed
4 to, to successfully accomplish, I should say, for a
5 dismissal of the crime charged.

6 That is what the United States intends to do here,
7 so long as Boeing continues to fulfill its obligations under
8 the DPA. And thus far, Boeing has fulfilled its obligations
9 under the DPA.

10 Those obligations are substantial. The payments,
11 your Honor -- your Honor asked a question about the
12 payments, and I do want to address that for a moment.

13 The MVRA, which is not specifically at issue here,
14 because there was not a filed charge and there was not a
15 conviction, the MVRA does authorize payments or restitution
16 payments to categories or persons or entities who are not
17 crime victims under the definition of the statute. If those
18 payments are agreed to by the parties, the Court, the
19 statute says, shall order that they take place.

20 That was the provision that was modeled here in
21 terms of the DPA. It was not drawn out of whole cloth.
22 There was a precedent for doing that in the Takata airbag
23 case, as was referenced in the government's filing.

24 And the payments with respect to the movants and
25 the crash victims, as well as with respect to the airline

1 customers of Boeing, those are not payments that are made to
2 crime victims under the CVRA. Those are payments that we
3 agreed to contractually with respect to Boeing.

4 As we've said earlier, had we to do this over, we
5 would have consulted with the crash victims at an earlier
6 stage. But nonetheless, that consultation was not -- you
7 know, was not required under the CVRA.

8 Your Honor, with respect to your supervisory
9 authority over the DPA, we would ask you to look at Fokker
10 and HSBC. We think the Second Circuit's decision in HSBC
11 and the D.C. Circuit's decision in Fokker instructs that the
12 Court certainly has authority, but it's in limited
13 circumstances.

14 It's in circumstances where -- not necessarily
15 where the Court is of the view that there has been -- you
16 know, the terms are too lenient. Specifically, the issue in
17 Fokker, or ultimately, that the Court may want to exercise
18 additional supervision because it's concerned that in the
19 future there might be some sort of misconduct or problem
20 that might arise. And so that was the concern that
21 underpinned the district court's decision in HSBC.

22 The Court in HSBC said the government -- the
23 district court has no freestanding supervisory power to
24 monitor the implementation of a DPA, but there might be, in
25 certain circumstances, where that authority would be

1 appropriate.

2 We would object -- if the Court were to exercise
3 authority or ultimately determine that, for whatever reason,
4 it was going to reject the DPA here, we would contend that
5 the Court would not have authority to specify the terms of
6 the DPA or any further agreement that might be reached by
7 the parties.

8 This is not a plea agreement. So we think that
9 that's different than a couple of cases that your Honor
10 filed. Because a DPA, as I said a moment ago, is a middle
11 ground. It's a contractual agreement that certainly is
12 filed with the Court, but it's not the same as a Rule 11
13 inquiry. It's not the same types of inquiry that might take
14 place with respect to a plea.

15 And ultimately, in Fokker Services, the Court said
16 that a district court lacks authority to disapprove a DPA
17 under the Speedy Trial Act on the grounds that the
18 prosecution has been too lenient in its exercise of its
19 charging discretion.

20 Here, we submit that we have not been too lenient.
21 I would ask the Court to come back for a moment to the
22 evidence that it heard at the Forkner trial. I'm sure the
23 Court has its view of that evidence. Certainly, the jury
24 did.

25 Again, that was a different charge, with different

1 elements, a different offense. But nonetheless, the
2 evidence was very similar. We submit to you that it was a
3 much more narrow case that supported the charge in the
4 information here that has been submitted by either amicus or
5 the movants.

6 Your Honor, with respect to the motion on
7 arraignment -- for an arraignment or hearing conditions of
8 release, we respectfully submit that the movants are
9 misreading the rule.

10 We agree that if an arraignment occurs, then it
11 must be in open court. But in many contexts an arraignment
12 might not occur, such as here, where the government has an
13 intention to move to dismiss the information, assuming
14 certain conditions are met.

15 And that is, as we've said, both in our filings
16 and today, that we do intend to do that. Again, assuming
17 those conditions are met.

18 The contention that there have been some
19 additional conditions of supervised release or some
20 condition of supervised release, we submit, is, one, there
21 isn't standing to make that argument at this point.

22 It doesn't mean that a member of the public -- the
23 Court couldn't hear from a member of the public with respect
24 to what conditions should be appropriate, but we submit that
25 there are not additional conditions that are necessary.

1 That Boeing has, in a host of ways, met its obligations
2 under the DPA.

3 Those obligations are onerous. They include
4 enhanced reporting requirements, the payments that we have
5 suggested, and certain changes that are referenced in the
6 DPA that the company has undertaken.

7 Not to mention the benefits, including, you know,
8 with respect to the significant litigation that movants and
9 other crash victims are engaged in, other third parties are
10 engaged in with Boeing that relates to the crashes, and any
11 concessions or factual assertions that were made in the DPA
12 that Boeing is not allowed, under the terms of the DPA, to
13 contradict.

14 In sum, in our view, there are instances, as
15 Boeing cited in its filing, and other instances where, in
16 the context of a DPA, a court does not hold an arraignment.
17 And in our view, it's unnecessary in this case. We
18 certainly understand the Court could disagree, but we just
19 don't see it as necessary.

20 It's not unlike -- well, there's other types of
21 cases involving a cooperator or other things where certain
22 types of hearings and proceedings might be delayed so the
23 cooperator can undertake the cooperation before formal court
24 proceedings begin.

25 We suggest the Court's order that I just

1 referenced makes that finding. You know, despite not having
2 the benefit of all the briefings that led to today's motion
3 hearing, the Court did make a finding that a delay of
4 approximately three and a half years, you know, would be
5 appropriate based on the submissions of the government and
6 Boeing.

7 Your Honor, finally, I will turn to the discovery
8 motion for a moment. We disagree with the movants'
9 construction of the Doe cases in Judge Marra's opinion,
10 Judge Marra's decision, with respect to the order of
11 discovery. First of all, the CVRA does not provide for a
12 discovery method or a discovery right.

13 The CVRA is very specific about various
14 mechanisms. It has remedies. As the Court referenced,
15 there's been two recent Supreme Court opinions where the
16 Court has said district courts should be, you know, very
17 careful about constructing remedies when a statute has
18 otherwise, you know, set forth remedies.

19 The In re Wild decision talked about that at
20 length with respect to the remedies that are set forth in
21 the CVRA. But most importantly, your Honor, in that case,
22 factually, the United States in that case agreed to provide
23 discovery.

24 The United States, after initially objecting,
25 ultimately agreed. And that issue was not fully litigated.

1 And in our view, the order with respect to discovery in that
2 case was essentially adopting an agreement or a concession
3 that was ultimately made.

4 We don't think that there's precedent for the type
5 of discovery -- precedent, in this circuit or otherwise, to
6 order the type of discovery that's being requested here, or
7 disclosure.

8 But I note that, I think it ultimately -- a number
9 of the requests here really come down to some of the same
10 issues that the Eleventh Circuit grappled with in
11 In re Wild. And your Honor has said you read that case very
12 carefully, so I'm not providing you with anything new.

13 But in response to counsel's arguments there, the
14 Court said, look, the CVRA rights are, you know, subject to
15 judicial enforcement.

16 But the problem is, is that if you try to go to
17 what the government could have proved or what the government
18 could have charged or what crimes the government might be
19 able to charge, the problem there becomes, what is the
20 limiting principle?

21 And ultimately, you're rubbing up against the
22 government's prosecutorial discretion. And so I come back
23 to In re Dean. I think In re Dean is obviously an important
24 case for the Court's determination, but the difference
25 between what's being attempted here, and what was sought in

1 In re Dean, is not consultation or notice when the
2 government, and ultimately the defendant, agreed that the
3 movants or crime victims here, it's our concerted view that
4 our criminal case, the case we were able to bring, we were
5 able to prove beyond a reasonable doubt, was limited. It
6 was limited to the facts I've just referenced.

7 And to create a process where ultimately there's
8 judicial enforcement and your Honor says, well, you know,
9 you really need to consider additional charges here. That
10 not only usurps, you know, the role of the district court,
11 but of the prosecution in its determination as to what is an
12 appropriate charge.

13 And the Court of Appeals in In re Wild said,
14 that's actually not -- that's outside the ambit of the CVRA.
15 That's not what the CVRA is designed to do. It's not
16 designed to get the Court involved in a determination as to
17 what crimes the government could bring or should bring.

18 And ultimately, we respectfully submit, that is
19 what is being sought here. So for the reasons referenced in
20 our brief, and that I've expanded on here, we respectfully
21 request that the Court deny the four pending motions. I
22 would be happy to address any questions.

23 THE COURT: Let me just ask you a few questions.
24 If I were to determine that they were crime victims under
25 the statute, then the government would have violated at

1 least those provisions of the CVRA that require the sort of
2 consultation before the agreement is consummated; is that
3 true?

4 MR. DUFFY: Your Honor, I respectfully submit it
5 would depend how you determined we violated them. If we go
6 into the In re Dean case, for example, and In re Dean, I
7 want to say, obviously, there is a chicken and egg, but in
8 In re Dean, there's an understanding on the part of the
9 government, because it goes into court requests that there's
10 delayed notifications, there's understanding that the
11 folks -- that they're crime victims, okay?

12 So the question I think you'd have to ask, if you
13 were going to go down that road is, at what point does -- at
14 what point do you determine that we determined that there
15 were crime victims?

16 THE COURT: Right.

17 MR. DUFFY: That's the real problem. That's the
18 issue, the discussion that the In re Wild judges had. There
19 was quite a bit of back-and-forth on just that issue.

20 We respectfully submit that the Fifth Circuit
21 didn't reach that. They didn't consider that. I mean, it
22 took almost 100 pages of -- at least in my printout, it's
23 100 pages -- of opinions in the In re Wild decision just to
24 address that so that all of the judges could be heard.

25 I submit to you, Judge, that that would be

1 really -- that's incredibly difficult to do. That's why
2 courts haven't done it, because what that requires you to do
3 is say, at what point did you determine they were crime
4 victims?

5 Now, if we came forward and said, well, we
6 determined they were crime victims at X period of time and
7 we want to ask the judge or we want to take some decision
8 that is contrary to the CVRA, then we understand that.
9 That's basically what happened, for the most part, in
10 In re Dean.

11 Here, you would have to -- I submit you'd have to
12 go to the issue of, okay, it's like, when did you know that?
13 What did you know, and when did you know it?

14 So we obviously have the moment of filing. Of
15 course, the Court could say, well, you know, at the moment
16 of filing --

17 THE COURT: Well, let me just stop you there. So
18 in your mind, though, it is not what I decide today. In
19 your mind it is, you could have -- if I were to determine
20 they were crime victims, that would not answer the question
21 in your mind.

22 The real question is, did you, in advance, make a
23 good-faith, honest mistake, in my view? If I were to go
24 this way, that's what I would be saying about whether or not
25 they were crime victims.

1 And therefore, if you made a good-faith, honest
2 but, in my view, erroneous mistake, if I were to go that
3 way, you would not have violated the CVRA, those provisions
4 that are required in advance?

5 MR. DUFFY: Well, I'm not -- I'm not saying that
6 precisely. I think that sort of goes to prospective and
7 sort of looking back, I think that's how counsel sort of
8 constructed it a moment ago.

9 What I am saying is we would, you know -- the
10 problem with coming to that observation, your Honor, is sort
11 of -- is saying, okay, so at what point was that?

12 Because if you're talking about a violation of
13 CVRA, what does that basically mean?

14 Does it mean when we filed the information on
15 January 7th of last year, or was it at some prior time, when
16 we were, you know, doing negotiations, so on and so forth?

17 But the issue, I think, then requires, what about
18 our evidence? What did our evidence show? You know, what
19 was the evidence when we collected it?

20 I think that's really what movants are getting at.
21 I think that's what they want to get at. They want to know
22 what our evidence was so they can make exactly that claim.

23 I don't know if the request by movants have
24 anything to do with civil litigation, but what it does seem
25 is that it's to expand the concepts of when or the time

1 period of that violation.

2 So I think that it's not -- it's a very
3 complicated question because, as we've said, as the Court
4 has seen, you've seen our evidence, most of it, and you've
5 seen what we stipulated to in the DPA.

6 And so I think we'd have to -- you know, we have
7 to hear from you what your view was of that, and then we
8 would have to respond. We can do so in good faith, but we
9 try to, you know, figure out our best way forward.

10 THE COURT: Let me just ask you this, try to put
11 it this way, then. Were you required at some point, when
12 you were zeroing in on what you were going to do in this
13 case, before you had consummated, obviously, but you were
14 zeroing in, were you required to consider what Judge
15 Higginbotham wrote in *In re Fisher*, to imagine the world in
16 which Boeing and Forkner and his colleague did not act in
17 the way they did.

18 And then determine whether, had they not done
19 that, these individuals would have lost their lives?

20 At some point, but before you initiated this
21 proceeding, were you required to do that?

22 MR. DUFFY: I believe -- I believe that we were.
23 I think that, you know, we are in the Fifth Circuit, and we
24 adhere to the Court's ruling in *Fisher*.

25 The reason, though, that I went through, not all

1 of them, but a litany of some of the issues that led to
2 these crashes.

3 THE COURT: Right.

4 MR. DUFFY: Investigations in connection with one
5 of the two, they're still going on.

6 THE COURT: And I understand that.

7 MR. DUFFY: Yeah.

8 THE COURT: Let me just ask you as it relates to
9 that, because in the stipulated statement of facts, the
10 statement of facts say that MCAS activated during the flight
11 and may have played a role in the crash.

12 MR. DUFFY: Yes, your Honor. MCAS -- and your
13 Honor heard, and I saw you pay close attention to when
14 Mr. Loffing described some of the causal factors that led to
15 the crashes, MCAS playing a role in the crash is not the
16 same as the training requirements for U.S.-based airlines
17 and U.S.-based pilots --

18 THE COURT: And the forum. Lack of it for the
19 forum, I understand --

20 MR. DUFFY: Exactly. And when you say "MCAS,"
21 there are so many different issues related to MCAS. And,
22 you know, we're not Boeing. We're not experts at this. But
23 what I can say is there's so many different problems,
24 including the single sensor --

25 THE COURT: Right.

1 MR. DUFFY: -- the fact that this particular
2 sensor was broken. But also, and I think most importantly
3 for your Honor's consideration for but-for and proximate
4 causation, for both, the facts, as referenced in the crash
5 reports -- which again, we're not sponsoring those facts --
6 but the fact the issues that the immediately preceding
7 flight, the immediately preceding flight had more or less
8 the same thing happen.

9 And that immediately preceding flight with the
10 faulty AOA sensor, those pilots were able to land that
11 plane. And then it wasn't reported, that problem,
12 adequately. It wasn't serviced adequately. And those --
13 and those, apparently, again -- all apparently, because, you
14 know, we, the government, are not trying to sponsor or
15 represent those facts, but those kinds of things are breaks
16 in the causal chain. They just, they have to.

17 I want to come back just for a moment, if I may,
18 just to your question, your Honor, In re McNulty, which
19 again, was one of the 2010-era cases that Judge
20 Higginbotham, and the Fifth Circuit looked to in the Fisher
21 decision. And again, that's at 597 F.3d 344, but
22 specifically at page 351.

23 They give a few examples of when an individual
24 might have been harmed, directly and proximately harmed in
25 commission of an offense that are close temporally or

1 proximately to the crime charged.

2 One example that's provided on that page was a
3 bank robbery, where an individual was inside the bank -- or
4 attempted bank robbery, and a shotgun was pointed in the
5 individual's face, approximately six feet away. And the
6 individual claimed, you know, restitution under that. And
7 the Court in that case, you know, approved that.

8 Another example was another bank robbery where, in
9 the course of the bank robbery, in the getaway car, the
10 individual crashed into a police vehicle and damaged a third
11 party's property in the course of the commission of the
12 offense.

13 And the court in that case indicated that, no,
14 those are crime victims as well, because it was close -- it
15 was close -- it was during the commission of the offense, so
16 it was close in time.

17 And I think, you know, to come back to your point,
18 in Fisher, you know, there was, you know, a competitor
19 contractor -- it was Mr. Meacham's case -- competitive
20 contractor.

21 You know, significant sums had been provided by
22 the competitor, Mr. Fisher. He ultimately did not -- was
23 not awarded the contract.

24 It's fairly clear that there was a corrupt process
25 involved in the contract by the defendant, and that there

1 was a causal relationship, some causal relationship between
2 the corrupt process and the fact that the individual,
3 Mr. Fisher, had not been awarded the contract.

4 But nonetheless, the Fifth Circuit said, no,
5 that's not enough. That's too remote. Too remote because
6 it's not -- it does not go to the facts, you know, reflected
7 in the jury verdict or admitted by the defendant, and it's
8 not a direct and proximate harm.

9 THE COURT: Well, Fisher didn't prove his status I
10 guess is a way to say it, because his complaint was that the
11 conspiracy was concealed. It wasn't the conspiracy, but
12 that it was concealed, but that wasn't the charged crime.
13 The charged crime was conspiracy.

14 MR. DUFFY: Right.

15 THE COURT: Not concealing conspiracy. And so,
16 the Circuit said that he did not -- I assume Judge Lynn --
17 said he did not reach this status because, had it been
18 known, he wouldn't have bid at all, because he wouldn't bid
19 in a process that is rigged by way of an illegal conspiracy
20 against him.

21 MR. DUFFY: Right.

22 THE COURT: And so what I'm wondering here is,
23 though, as it relates to the stipulated facts in paragraphs
24 49 and 53, that it appears to be the case that, in these two
25 airline crashes, MCAS activated.

1 And MCAS, I'm sorry I don't know the technical
2 term, but the nose of the plane was pushed down so that it
3 plummets. And so why isn't that alone enough to conclude
4 that they would be crime victims based upon the stipulated
5 facts here, even if another pilot might have been, you know,
6 a Top Gun graduate and can maneuver out of something like
7 that?

8 MR. DUFFY: That doesn't get -- that doesn't get
9 to direct or proximate cause. Specifically, those focus on
10 proximate cause. Because we know that proximate cause is
11 not just foreseeability, it is, as the Fifth Circuit said in
12 Salinas, it's proximate cause incurred. That's how directly
13 each cause affected the final outcome.

14 And the crash reports, for example, alone have
15 hundreds of pages of causes. They do. And what we know
16 from our -- from the criminal case here and, again, you have
17 to look at, again, the stipulated facts -- but the
18 aspects -- the problematic aspects of MCAS that later became
19 known were not known to Mr. Forkner. They were not known to
20 Boeing Individual Employee Number Two.

21 In fact, the key chat, the text message chat,
22 which I'm sure the Court remembers it, "I lied to regulators
23 unknowingly." And the next line, or line -- two lines later
24 is, "Why are we just learning about this now?"

25 And we know that there were disclosures to the FAA

1 by Boeing employees about the technical aspects of
2 substantial disclosures on multiple occasions. We know that
3 those disclosures took place. We know --

4 And so, unlike the claims of some, you know, it
5 was not a necessary part of the conspiracy that everybody at
6 Boeing say nothing about MCAS, you know, to the FAA.

7 We also, with respect to the remoteness, we
8 also -- so there's a foreseeability issue there with respect
9 to the conspirators. I don't think -- one of the key things
10 here is to not conflate what everybody at Boeing knew with
11 what the conspirators knew.

12 That's a key part of this Court's analysis. The
13 Court's heard the evidence, saw the evidence of that. It's
14 relatively limited. That's a key underpin here, I think, to
15 your decision.

16 Another component is that there were -- the
17 conduct -- the focus of the conduct here was to the FAA AEG.
18 The congressional report, cited again in the Forkner case,
19 the congressional report indicates that, you know, contrary
20 to the movants' claims, that the FAA AEG did not have
21 control over what foreign regulators or foreign airlines did
22 with respect to training. The conduct, again --

23 As you go through the causal factors, and the MCAS
24 itself had product design issues. I don't know if I want to
25 go so far as to say product design flaws -- others might say

1 that -- but there are significant product design issues that
2 are raised here, not known to the conspirators. Not known.

3 So when you combine those with the fact that, in
4 the immediately preceding flight, when it did improperly
5 engage, that crew was apparently able to land the plane, it
6 does go to but-for causation, as well as proximate
7 causation.

8 THE COURT: Let me ask you this. In terms of
9 making this decision, is it proper that I would consider the
10 statement of facts?

11 In other words, I'm not limited to simply the
12 information that you have filed. Would it be proper for me
13 to consider that, as well as consider the statement of facts
14 that you all have filed?

15 MR. DUFFY: Yes, your Honor. And we think that's
16 exactly what the In re McNulty case said as cited by -- I'm
17 sorry.

18 THE COURT: No. No. And just if I may follow up
19 on that, did you have an opportunity to read your
20 colleague's citation to the D.C. Circuit opinion In re de
21 Henriquez?

22 MR. DUFFY: Yes.

23 THE COURT: And so as it relates to that, then, do
24 you feel like, at least in the D.C. Circuit, that they are
25 permitting the district judge to consider evidence outside

1 those kinds of documents?

2 MR. DUFFY: A couple things about that case. One,
3 first, we think that case was incorrectly decided.

4 THE COURT: By the D.C. Circuit?

5 MR. DUFFY: By the D.C. Circuit. We do.

6 We also think that was a different type of case.
7 It was a drug conspiracy where there was an alleged murder.

8 THE COURT: Right.

9 MR. DUFFY: And then, you know, there was a
10 different concept of foreseeability in that context. It was
11 a paramilitary organization in Colombia. And, you know, the
12 sort of the head, I don't want to call it anti-paramilitary
13 organization, but somebody who's ultimately -- you know, who
14 was murdered.

15 In that case, the Court of Appeals did not say
16 that the claimed conduct was, in fact, a crime victim. They
17 said that the district court should essentially consider the
18 statement to be provided. And then consider that in the
19 context of the crime charged and the factual basis that's
20 set forth.

21 THE COURT: And I guess my question to you -- I
22 only read the opinion. So I didn't look at any of the
23 briefs or --

24 MR. DUFFY: Yeah.

25 THE COURT: -- or any of the evidence submitted

1 with the briefs -- but the D.C. Circuit reversed, directed
2 the district court to consider, as you say, whether they
3 were crime victims.

4 And the D.C. Circuit said the question is whether
5 the murder bears the requisite connection to the overall
6 conspiracy.

7 So my question to you is, why did they have to do
8 that if, in the D.C. Circuit, they would be limited to the
9 indictment and the factual resume, because the D.C. Circuit
10 undoubtedly would have had both of those on appeal?

11 MR. DUFFY: Sure. And also to your point, Judge,
12 you know, in Fisher there was a victim impact statement by
13 Mr. Fisher in a related case.

14 And so they considered the victim impact statement
15 that had been made by Mr. Fisher in ultimately their
16 determination. We would concede that direct and proximate
17 causation is not solely defined by the statement of facts.

18 But what we would say, your Honor, is that the
19 statement of facts are what the government can prove beyond
20 a reasonable doubt, or said they can, and that's what the
21 defendant has agreed. And so that statement of facts forms
22 the basis.

23 And it's not just -- and I would say this, your
24 Honor, de Henriquez does not talk about proximate causation
25 necessarily. It talks about the but-for causation. It

1 doesn't go into the analysis. That's one of the reasons why
2 we think it doesn't solely answer the question here.

3 If you come back to the concept of proximate
4 causation, you have to ask about remoteness and all the
5 other causal factors. This is not a scenario, your Honor,
6 where there is a violent drug organization in Colombia
7 that's distributing large quantities of cocaine and willing
8 to murder people that are in its way.

9 This is a fact pattern that the Court heard during
10 the Forkner trial, cabined and limited in the ways that
11 we've discussed today, but that the Court saw during the
12 evidence.

13 And then there are all of these different causal
14 factors. So many. Quite a few. I could go through a few
15 more that we believe the Court would ultimately have to get
16 to.

17 And the reason we don't think the Court has to do
18 that is because there are so many. It's not as simple as
19 saying, well, MCAS may have played a role, and then the
20 crashes happened. It's, okay, but there are -- that's not
21 what the crime charged was.

22 Let's start with that. The crime charged was
23 about what Mr. Forkner and Mr. Gustavsson knew -- excuse me,
24 Employee Individual Number Two knew with respect to the time
25 period of the conspiracy. And they did not know all the

1 issues about MCAS. They didn't know its faults.

2 They didn't know what had been disclosed to the
3 FAA. What they did know, we submit, is that it had fired in
4 a simulator in a way that was at low speed.

5 And so it was outside the parameters that had
6 previously been disclosed. The only other evidence as set
7 forth in the statement of facts, the only other evidence
8 about confirming that was Mr. Loffing, who's referenced by
9 nomenclature, but the Court heard his testimony in trial
10 that, I had a conversation confirming the expansion but not
11 the details. I referred Mr. Forkner to other engineers at
12 Boeing.

13 I'm summarizing, but that's, I think -- I'm sure
14 the Court will remember that testimony.

15 And if we come back from that, I want to
16 reiterate, we did not find, and the statement of facts does
17 not include that there were other -- other occasions where
18 that evidence or that information was provided to
19 Mr. Forkner. Here are the problems. Here are the issues.
20 So we have to come back to, I think, foreseeability and
21 remoteness.

22 And that's the reason, when you talk about all of
23 these different causal factors, that's the reason that we
24 believe, certainly under Fisher and under the construction
25 of McNulty, that there is no proximate cause, let alone a

1 but-for causation.

2 THE COURT: Let me ask you to address this
3 question. Would the Department of Justice be prohibited
4 under this agreement from bringing a manslaughter or a
5 negligent homicide or some other case against Boeing related
6 to the injury, the deaths of these individuals, if you
7 believed you have evidence that could establish that?

8 MR. DUFFY: Your Honor, first, I have to say we
9 did not find evidence that would establish that, first.

10 THE COURT: Right. Well, let's just take the
11 hypothetical. Let's assume that you uncover some evidence
12 that would allow you to make that case, and they didn't hide
13 it. You uncover it, they didn't hide it. Just
14 hypothetically. Just humor me.

15 MR. DUFFY: That's extremely difficult, your
16 Honor.

17 THE COURT: Yeah.

18 MR. DUFFY: Because --

19 THE COURT: And that's what hypotheticals do.

20 MR. DUFFY: Yes, sir.

21 THE COURT: So just so I can understand the DPA --

22 MR. DUFFY: Right.

23 THE COURT: -- because I have a follow-up question
24 about that as it relates to these individuals.

25 MR. DUFFY: Right.

1 THE COURT: And so --

2 MR. DUFFY: It would entirely depend. The
3 hypothetical would entirely depend on what the facts were
4 that led to that conclusion. You asked, could we bring that
5 case?

6 THE COURT: Yeah.

7 MR. DUFFY: We could not bring that case based on
8 the facts set forth in the DPA, because there is a
9 limitation of liability with respect to the facts set forth
10 in the DPA. But specifically, the conduct related to those
11 facts. So it's the conduct for which there's a limitation
12 on liability. All right?

13 And so we did not find evidence that these other
14 charges could be brought. And, in fact, I have to come back
15 to the evidence that we did find of criminal conduct. It
16 was extremely limited.

17 You can't import what the 300-something paragraphs
18 that have been put forth in the movants' filing or what
19 might be in a Netflix documentary or articles about this
20 scenario, you can't import that into a criminal case. We
21 did not find evidence of criminal intent -- criminal
22 intent -- by actors beyond Mr. Forkner and Boeing Employee
23 Number Two. That is the footprint here.

24 So if we're talking about -- if we're talking
25 about a manslaughter with respect to Mr. Forkner and

1 Individual Number Two, you know, and then holding Boeing
2 accountable criminally for that? That case, we didn't find
3 that. We didn't find anything close.

4 THE COURT: Right. And so my question to you,
5 though, is just assume for a moment that someone at DOJ
6 didn't read all the documents carefully.

7 And now because Judge Cassell has raised this
8 issue, you've gone back and reviewed them, or your successor
9 comes to the view that you were wrong and we certainly ought
10 to prosecute Boeing for this. We certainly could prosecute
11 Boeing for this on the facts.

12 Would this DPA agreement bind your successor to
13 not bringing that manslaughter case?

14 MR. DUFFY: It would depend on the following: It
15 would depend if the evidence that you're saying came to
16 light, if it was new evidence that was outside the conduct
17 set forth in the DPA.

18 THE COURT: And if it was not new evidence -- in
19 other words, it existed at the time. Someone just didn't
20 realize it, didn't discover it, didn't appreciate the
21 significance of it. A new set of eyes comes in and looks at
22 it, your successor, and they come to the conclusion, boy,
23 Boeing is liable here. We could convict Boeing on this.

24 MR. DUFFY: Well, let me say a couple things. The
25 limitation on liability has several exclusions, which I'm

1 sure the Court has seen in plea agreements, such as a crime
2 of violence, a tax offense, and so forth. So there would be
3 an issue as to whether or not that's a crime of violence,
4 candidly.

5 And so that's a more subtle question that maybe
6 you're going to ask that too, which I would be happy to try
7 to respond, but I can't respond to that off the top of my
8 head.

9 THE COURT: Okay.

10 MR. DUFFY: What I can say, though, is that the
11 facts set forth in the DPA are much more limited than
12 everything, you know, that happened with respect to the
13 design flaws, not there.

14 With respect to what did and did not get disclosed
15 on the engineering side, not there. The contents at least.
16 There is reference that there were other disclosures.

17 With respect to, you know, the incentives that may
18 have existed within the company generally to try to get the
19 MAX approved within a certain period of time, not there.

20 Because that's not criminal conduct from our
21 perspective. We didn't find evidence that persons acted
22 with criminal intent in that regard.

23 THE COURT: Let me try this. If the DPA would
24 prevent the Department of Justice from indicting Boeing for
25 a manslaughter-type charge or for a charge related to Lion

1 Air and Egyptian Air, whatever the charge is, okay, if the
2 DPA would prevent that -- you got to assume with me, okay?

3 MR. DUFFY: Yes, sir.

4 THE COURT: I'm not asking you to concede that.
5 Just assume with me it is.

6 MR. DUFFY: Yes.

7 THE COURT: Would that then make these people
8 crime victims?

9 MR. DUFFY: If we specifically agreed to waive
10 liability on a crime for which they were harmed, would they
11 be crime victims?

12 Your Honor, I don't believe that there's specific
13 case law on that, so that would be new. I am not aware of a
14 case that says that. So I don't -- I'm not aware of that.
15 You've asked me -- I am not aware of that.

16 You've asked me sort of on a very large
17 hypothetical that I think is relatively, with respect, far
18 afield from the facts in this case.

19 THE COURT: And I'm sorry we're running long here.
20 I was hoping to get you all out of here by lunchtime. So
21 just let me make sure that I've asked you what I need to
22 ask.

23 The Court in In re Dean says that the district
24 courts, so it says that I am "bound to enforce" the CVRA's
25 requirement that the prosecutors confer with the victims.

1 If I were to conclude that they were victims, how
2 would I enforce that in this case today?

3 MR. DUFFY: Your Honor, if you concluded that they
4 were victims, and we respectfully request that you do not
5 for the reasons submitted, you know, I would note that the
6 Attorney General himself has already met with the victims in
7 this case.

8 THE COURT: And that is very commendable to Judge
9 Garland. I'm not surprised that he has done that. So I
10 should have made note of that when I started.

11 But, yes. Go ahead.

12 MR. DUFFY: And that was the third of three
13 meetings that took place. The United States has stated in
14 its brief that it stands by the decision that was made.
15 That decision is based on the facts as we've gathered them
16 after our investigation.

17 But if you were, you know, to order us to, you
18 know, to meet with the crime victims, we would accede to the
19 Court's order, of course. I mean, I don't know --

20 THE COURT: That's how I would enforce it.

21 MR. DUFFY: I don't know what the contours of the
22 Court's order would be.

23 THE COURT: Yeah.

24 MR. DUFFY: Because obviously, we would have to
25 consider, you know, the implications in this and other

1 cases.

2 THE COURT: Yes. Yes.

3 MR. DUFFY: Candidly, but I do -- we certainly --

4 THE COURT: But to some degree --

5 MR. DUFFY: -- on a prospective basis, if the
6 Court were to focus on -- if I may? If your question is on
7 a prospective basis, what would we do?

8 THE COURT: In this case, not with other cases.

9 MR. DUFFY: In this case. Understood.

10 THE COURT: I realize your briefing said you were
11 making policy changes, but as it relates to this case. As
12 it relates to this case.

13 MR. DUFFY: First, we would follow the letter of
14 your order. You know, you could, of course, order us to
15 meet with the victim -- the movants. You know, whether or
16 not you determine that they're crime victims under CVRA is,
17 you know, a different issue, but we -- you could order us to
18 further meet with the movants to provide them notice and so
19 forth.

20 We actually have been providing notice of the
21 hearings and of the Forkner hearings, so on and so forth, on
22 a voluntary basis through our website. Through a website
23 notification process and so forth. And so that you
24 certainly could do.

25 THE COURT: Just one more question. Is it the

1 Department's view that, when there is a violation of the
2 CVRA, that these remedies are appropriate, or as a
3 prudential matter, or are you of the view that the law, the
4 CVRA itself, and the opinions interpreting that provide for
5 these remedies?

6 MR. DUFFY: Excuse me, your Honor, "these
7 remedies," meaning what's set forth in the CVRA?

8 THE COURT: Of course, setting the agreement
9 aside --

10 MR. DUFFY: Oh, okay.

11 THE COURT: -- restoring the case to the status
12 quo ante, before all of this occurred.

13 I guess what I'm asking you is, is it your view
14 that, if there are CVRA violations, that there is no remedy
15 for these people?

16 The Eleventh Circuit is back and forth, for
17 instance, in that anything that occurs that I might do or
18 that Judge Rosenthal did, that we're just doing that as a
19 prudential matter and you're not objecting to it?

20 MR. DUFFY: Right. The CVRA, first of all, with
21 respect to some of the remedies, I'll understand that
22 question to mean, for example, a set-aside of the DPA.
23 Well, excising provisions of the DPA or some of the other
24 things you just referenced.

25 It is our view that those are outside the CVRA.

1 That those are not specifically provided in the CVRA.
2 However, the CVRA does specify remedies, including an
3 administrative remedy to have any complaints, with respect
4 to the CVRA or any violations, be heard internally. There's
5 a specific provision about that, your Honor.

6 I think you should consider that seriously,
7 because that's what Congress put there. And Congress said,
8 we are designating the attorney general to be the final
9 arbiter of this, but we're designating the attorney general
10 to promulgate rules and to, you know, see that personnel
11 from the Department of Justice follow the provisions of the
12 CVRA.

13 So it's our view that there is a remedy provision,
14 and that that is the remedy provision that should exist.
15 But nonetheless, we're also committed to doing -- going
16 beyond that.

17 So we're committed, for example, as we have here,
18 to reaching out to folks who might not be CVRA crime victims
19 by definition, but as we've referenced here, as with the
20 analogy of 3663(a)(3) this sort of -- you know, in the
21 Takata case, I don't think it called it additional persons,
22 but additional persons who may have been impacted in some
23 way.

24 And so, for example, the \$500,000,000 payment here
25 or the payments to the airlines. So having communications

1 with them to making them informed and part of the process,
2 that is what we referenced obliquely to a degree in our
3 filings is right now under consideration by the Department
4 as to how to do a better job with that.

5 THE COURT: Okay. Well, one more question. You
6 said I would have had the power originally to reject the
7 DPA. Is that authority in the Speedy Trial Act?

8 Do you agree that the interpretation of (h)(2)
9 that Mr. Cassell provides is the authority to do that?

10 MR. DUFFY: We don't agree with that construction
11 of it.

12 THE COURT: Okay.

13 MR. DUFFY: Because both HSBC and Fokker say such
14 a determination would have to be based on something
15 substantial. And there has not been a court that has held
16 that a DPA could be set aside based on a violation of the
17 CVRA.

18 THE COURT: No. No. No. I'm sorry. I wasn't
19 clear. I moved over to the Speedy Trial Act, 3161.

20 MR. DUFFY: Yes.

21 THE COURT: And so my authority to, for whatever
22 reason, I set aside, if I were to reject the DPA. Where is
23 the authority, even if it meets the high burden that you
24 would agree would allow me to do that, where does that
25 authority come from?

1 Is it this speedy trial provision that has "with
2 the approval of the Court" or is it something else?

3 MR. DUFFY: Ultimately, your Honor, it would be in
4 connection with the Speedy Trial Act. Although Fokker says
5 specifically the limitations on that. So we don't think
6 that that authority would be, well, I'm going to set it
7 aside. It would have to be based on some very -- you know,
8 a basis that was far outside that in Fokker or in HSBC.

9 THE COURT: And what would be an example that
10 would permit that? I promise that's my last question.

11 MR. DUFFY: Well, HSBC talked about a couple of
12 examples. HSBC talked about if there was some sort of
13 substantial government misconduct, for example.

14 But not -- you know, but in relation to the
15 mechanism or the means by which the DPA was arrived at or
16 something along those lines, we respectfully submit that
17 that's not here.

18 Even if, your Honor, even if you were to find that
19 there was a violation of CVRA, I respectfully submit that
20 the causal factors here are substantial.

21 The causal factors between the crashes and the
22 conduct charged in the information, first, are remote, and
23 have a degree of remoteness that there isn't precedent on
24 point that would show that, oh, in this fact pattern, folks
25 such as this would be considered to be crime victims under

1 the CVRA, given the limited conduct that really is -- forms
2 the basis of a criminal charge here.

3 And that -- so we come back to the issue of,
4 okay, if there's an incredibly close question, is that
5 substantial misconduct? And we would say, respectfully,
6 that that is not.

7 THE COURT: Very good. Thank you.

8 MR. HATCH: Good morning, your Honor. Ben Hatch
9 on behalf of The Boeing Company.

10 Thank you, your Honor. The Court clearly has the
11 benefit of the briefing and has reviewed the briefing, has
12 reviewed the cases.

13 And with the Court's indulgence, what I plan to do
14 is really focus on what I see as the core issues of the
15 case, which I think actually dovetails well with the
16 questions the Court has asked to the other counsel.

17 So with the Court's indulgence, I will try to do
18 that, and be direct. I welcome any questions the Court has
19 as I proceed at any point.

20 THE COURT: Yes.

21 MR. HATCH: And then address a couple comments I
22 think Mr. Cassell made separately.

23 I do want to begin and, your Honor, this is in our
24 brief, and I would not generally repeat our briefs at all,
25 but I did want to begin by saying to the Court, and in light

1 of the representatives of the crash victims that are here
2 today, something that Boeing did say in its brief, which is
3 that Boeing acknowledges and profoundly regrets the
4 inestimable impacts of these tragic accidents.

5 And it extends its deepest condolences to all the
6 families and loved ones of those lost on the Lion Air 610
7 and Ethiopian 302 flights. Thank you, your Honor.

8 Turning to the legal issues that are before the
9 Court. I think the Court looks first to the text of the
10 statute. Here, the text of the statute is the CVRA.

11 There's four things in the CVRA that I think are
12 dispositive textually over this whole case. First, there is
13 no right to dictate the terms of a DPA that is granted to
14 CVRA victims. In fact, the CVRA expressly in 3771(d)(6)
15 reserves to the attorney general and his designees
16 prosecutor discretion. And that's what's reflected in the
17 DPA.

18 There's no right to discovery and there is no
19 right to reopen a DPA. I think that's indisputable in the
20 text of the statute.

21 The fourth point is that the definition of a CVRA
22 victim turns on a federal offense. And this Court asks
23 questions about -- I think to Mr. Duffy -- about could there
24 be victims of an uncharged offense?

25 And the answer, in my interpretation of the CVRA,

1 is no. There has to be a federal offense. I think the case
2 law supports that. Here, the federal offense is the offense
3 reflected in Count I of the criminal information before the
4 Court.

5 And so that would be the federal offense to which
6 the Court would look in assessing whether these movants are
7 direct and proximate victims of that federal offense, not
8 some uncharged hypothetical, you know, perhaps investigated,
9 perhaps not, crime.

10 The case law, and that segues into the case law,
11 does not support that. Really, there's five cases that I
12 wanted to touch on quickly that your Honor has asked
13 questions on pretty much every one of these.

14 But they're In re Dean, I assume the Court looks
15 first at Fifth Circuit authority. So In re Dean. There's
16 the Fisher case. There is HSBC, and Fokker, and then In re
17 Wild, not necessarily in that order.

18 In re Dean, your Honor, I submit actually supports
19 denying the requested relief here. In In re Dean, and I
20 know Mr. Cassell walked over that history, although I did
21 want to fill in the last chapter, as the Court said, you had
22 not read the remand decision by Judge Rosenthal.

23 In re Dean, the Fifth Circuit said on mandamus
24 that there had been not been -- or there should have been
25 consultation prior to entering into the plea agreement that

1 was entered into with BP in that case, but it did not order
2 that that consultation occur as a remedy.

3 I think there's a good argument, your Honor, that
4 that's dicta in the decision, but I don't know that the
5 Court really needs to go there. It did say there should
6 have been consultation.

7 But ultimately, at the end of the day, it did not
8 order on remand that there be consultation preplea. The
9 plea had already been entered and proposed, right?

10 And it's parallel in that respect to this case,
11 where there's an agreement that's already been entered on
12 the Court's docket.

13 What the Fifth Circuit said, in denying mandamus,
14 was I'm going to send it back to Judge Rosenthal who has
15 allowed these victims to be heard at the plea hearing.
16 Similarly, this Court has allowed these movants to be heard
17 at length today on their arguments.

18 We're going to trust Judge Rosenthal to evaluate
19 their input in deciding on whether to accept the plea
20 agreement which the Fifth Circuit had put on hold while that
21 mandamus ran its course.

22 On remand, it went back down to Judge Rosenthal in
23 a very lengthy and thorough opinion. Judge Rosenthal
24 addressed all the movants or victims in that case --
25 Mr. Duffy said he agreed they were CVRA victims -- addressed

1 all of their arguments and determined ultimately to accept
2 the plea that was entered.

3 And so that's important because, even though the
4 Fifth Circuit said there should have been, again,
5 potentially in dicta, but there should have been preplea
6 consultation. That was not the remedy that was ordered.
7 That was denied.

8 It went back down and the judge considered their
9 views and ultimately accepted the plea that had been entered
10 without the benefit specifically of any preplea
11 consultation.

12 So I think the Court can take from In re Dean that
13 it was not a remedy in that case to undo the plea agreement.
14 And the other point is, of course, the Court has a different
15 role with respect to plea agreements than a court does with
16 respect to DPAs.

17 The plea agreement in the In re Dean case had to
18 have a hearing in front of the court. Ultimately, the Court
19 had to decide whether to accept it. And then pleas, of
20 course, precede sentencing in federal criminal law.

21 And CVRA victims would have rights to be heard at
22 those stages of the case, right? The plea hearing and at
23 sentencing.

24 A DPA, by contrast, is an agreement to defer
25 prosecution on a charge -- one or more charges. Here, one

1 charge. And all that's been entered is that agreement on
2 this Court's docket that has deferred prosecution, and the
3 Speedy Trial Act has been extended under the court's order.
4 And so there are not those similar proceedings to be had as
5 happened in In re Dean.

6 But I think the key point is In re Dean actually
7 supports not granting the relief that's requested here
8 because the Fifth Circuit did not send it back for preplea
9 consultation in that case. So that was the last stage of
10 that case.

11 With respect to one common thread, your Honor, and
12 I very much respect Mr. Cassell's arguments in reading the
13 cases. He's in almost every one I read. I did not have the
14 background of this body of law that he obviously has, having
15 litigated it for so long.

16 But his cases are often district court cases that
17 then did not get affirmed or supported on appeal.

18 In re Wild is the second case I would come to. I know the
19 Court's already asked about it and heard argument on it.

20 In re Wild is the only case that I could find, and
21 Mr. Cassell cited it, where a court contemplated undoing, in
22 that case, a nonprosecution agreement. I say contemplated
23 because the court in the district court proceedings never
24 actually ordered that as relief.

25 The opinion that talked about undoing an NPA was

1 an opinion about whether there was standing to even engage
2 in those proceedings. The court said the government's
3 argument was there is no redressability as required under
4 Article III because you can't put aside an NPA. The court
5 said, no, I think I could put one aside, but that was just a
6 standing decision.

7 Ultimately, the district court never ordered
8 invalidating that NPA because ultimately Mr. Epstein passed
9 away, and so relief was denied.

10 And then, when they go up to the Eleventh Circuit
11 en banc, what did we learn? Which is that that 10 years of
12 litigation should have never happened.

13 The specific holding of the en banc court is that
14 there's no private right of action created by the CVRA, as
15 was utilized in the district court in that case, but the
16 Court has read it.

17 The reasoning of *In re Wild* I think is broadly
18 important to the issues in this case. It talks about the
19 impingement on prosecutorial discretion that would occur if
20 you try to assess who are CVRA victims, which you need to
21 know what's the federal offense if you try to do that for a
22 crime the government has not brought. Okay?

23 And so that's why I think here the Court has to
24 look under the CVRA to the Count I criminal information for
25 all the reasons that *In re Wild* said there's no basis to go

1 beyond that.

2 Only the prosecutor can determine what federal
3 offenses are supported beyond a reasonable doubt from his or
4 her investigation and bring those charges. And In re Wild,
5 I think, has very persuasive reasoning on that that really
6 undercuts, even though it's specifically just talking about
7 the private right of action, it really undercuts the
8 reasoning of several of the subsequent district court
9 decisions in that series of litigation.

10 With respect to Fokker and HSBC, I will take those
11 together. These are other ones where Mr. Cassell relied on
12 the district court decisions, but then they were
13 subsequently overturned on appeal.

14 The Court has asked about, can the Court overturn
15 the DPA? Reopen the DPA? You know, does the Court need to
16 approve the DPA?

17 I think those appellate decisions line up to say,
18 no, there's not. Unlike a plea agreement, unlike certain
19 other stages, a court does not approve a DPA. It's filed on
20 the court's docket. The court decides whether to exclude
21 time under the Speedy Trial Act, which your Honor has
22 already ruled on.

23 There's no later approval by the court, that -- as
24 Mr. Duffy was saying, a DPA is not a plea. It's a lesser
25 form of resolution. So there's no approval by the court of

1 a DPA.

2 And what those cases -- looking to your Honor's
3 questions about the Speedy Trial Act, what they say. In
4 neither case did they undo the DPA. So both of them were
5 just discussing possible outcomes, right, because they both
6 denied or overturned the district court in those cases.

7 What they say about the Speedy Trial Act is a
8 court -- the language about approval of the court -- a court
9 would potentially look at a DPA that's filed under a Speedy
10 Trial Act.

11 And if the court felt it was a sham, it was just
12 presented to exclude time without a real intent to defer and
13 engage in that agreement, that would be the kind of lens the
14 court would take under the Speedy Trial Act. Is this just a
15 sham to push off trial court proceedings?

16 And there's no claim here, in all the briefing,
17 that somehow this DPA is a sham. Boeing has been complying
18 with it for almost a year and a half now, as the Court has
19 heard. So there's no argument it's a sham meant to exclude
20 the Speedy Trial Act.

21 So that's the lens that HSBC and Fokker I think
22 interpret the Speedy Trial Act. And your Honor had some
23 questions also about, you know, what other basis. The other
24 ground they looked at was whether there was a basis under
25 the Court's general supervisory authority.

1 And, you know, without ruling on every aspect of
2 that necessarily, in the ones before them, they both
3 concluded that that is not -- there has not -- I think that
4 was more HSBC really looking at the supervisory. There is
5 not a general supervisory authority to evaluate the terms of
6 a DPA.

7 I know your Honor referenced Fifth Circuit law and
8 plea agreements, but in my research, the Fifth Circuit has
9 not in any way diverted from that that would be applicable
10 to a DPA. It's different from a plea agreement, as your
11 Honor well knows.

12 Your Honor asked a couple questions about the
13 Fisher decisions from the Fifth Circuit. And the Fisher
14 decisions, one, your Honor referenced in Fisher the
15 proposition that you can't rely on concealment of the
16 conspiracy to be your but-for cause of your conduct. And
17 certainly, the Fisher cases said that.

18 I think the Fisher cases also said for but-for,
19 you have to look at what would the world -- take the minimum
20 amount necessary to bring the unlawful conduct in conformity
21 with the law and look at that but-for world, and only if the
22 crime -- or only if the harm would not have occurred in that
23 but-for world, is it a but-for cause.

24 So there's also that element of Fisher on but-for
25 causation that I think is very important here, because

1 there's so many steps that would be required to assess
2 whether in the but-for world this harm would have occurred.

3 The cases specifically for Fisher uses the term
4 too speculative. The district court says it's too
5 speculative, too many steps. And the Fifth Circuit upheld
6 that on appeal.

7 Other cases like the In re Antrobus have used two
8 factually and temporally attenuated. Similar concepts. If
9 there's too many steps, then it's not going to meet the
10 definition.

11 And here, your Honor asked a couple of questions
12 about the statement of facts and the reference to that MCAS
13 may have played a role in the accidents that are contained
14 in the statement of facts.

15 I think, as Mr. Duffy was saying, the statement of
16 facts is focusing on the -- you know, it has the criminal
17 information that it supports, which is the concealment of
18 information to the AEG about the training assessment.

19 I think both accidents are extremely complex
20 events, a lot going on in both of them. But just to
21 illustrate, you know, what would it take to say that the
22 concealment of information to the AEG that is alleged in the
23 criminal information was connected with the accidents?

24 I mean, some of those steps you have to first ask,
25 would the FSB report have changed in some way with respect

1 to the training, because it's training determination?

2 So would the FSB report require training on MCAS
3 in its differences training?

4 Number two, would the FSB report have required a
5 different level of training than the level it originally
6 determined, Level-B training?

7 Would it have required simulator training? That's
8 another step the Court would have to look at.

9 Assuming it did require training, assuming it
10 required simulator training, would that simulator training
11 have included in its content training on what ultimately
12 were the accident scenarios? That's unknown. These would
13 all have been decisions to be made by the AEG. That would
14 be another step.

15 Whatever that series of decisions that the AEG
16 would make, would those be carried over in exactly those
17 terms for foreign operators, because, of course, the AEG is
18 with the FAA. It doesn't control foreign operator decisions
19 by other jurisdictions.

20 And then would -- if you take all those steps,
21 would that training have then -- what impact would it have
22 had in the actual scenarios that the pilots faced in the two
23 respective flights that resulted in accidents?

24 And that's just an example, your Honor, to walk
25 through, just on the training piece, all the steps you have

1 to take to get to actually what happened in the accident
2 scenarios.

3 The last point I wanted to come to in the summary,
4 if you will, your Honor, is your Honor asked Mr. Cassell
5 some questions about what is it you're asking for here?

6 Are you asking for me to undo the DPA, reopen the
7 DPA, or just to excise portions of it?

8 And I don't think Mr. Cassell said he was asking
9 to have -- your Honor said, do you want me to red line it?
10 I think he said, I'm not asking to excise.

11 Respectfully, their reply brief on the principal
12 motion, the second amended motion, pages 24 to 49, is
13 devoted to excising portions of the DPA as a remedy that
14 runs through their briefing.

15 They want to excise release from liability
16 provisions, potentially other provisions. I would call that
17 a red line. So they are certainly seeking to excise
18 provisions.

19 In my research, your Honor, I have not found any
20 case in the country that has ever done what Mr. Cassell is
21 asking, that has ever overturned a DPA on the basis of the
22 CVRA. I don't believe a case exists.

23 I would say, especially this notion of excising,
24 there's no support for the CVRA or the law interpreting it.
25 There's really no support for that in contract law, which a

1 DPA is a contract, like a plea agreement is a contract. You
2 don't --

3 When the parties have entered into agreements, you
4 don't come behind and just excise certain portions to the
5 detriment of one party or another. So I think that also
6 would violate contract law to go that route.

7 At times their briefing also asked to just reopen
8 or undo the DPA entirely, but I'm not sure -- they don't
9 really mean that. It sounds maybe easy in a sense, just
10 undo it.

11 But the part that they don't account for is that
12 Boeing has performed. As Mr. Duffy told the Court, Boeing
13 has performed and satisfied its obligations for a year and a
14 half. And that performance included funding the
15 \$500,000,000 fund for the crash victims. It included
16 payments to airlines. It included changes to Boeing's
17 compliance program and regular reporting to the department.

18 And so no one is suggesting that Boeing could get
19 those back. Boeing can't be put back in the position it was
20 in when it negotiated the DPA with the Department, because
21 it's performed for a year and a half.

22 So I respectfully think that there's not a remedy
23 to just reopen the DPA because Boeing can't be put back in
24 the position it was in when it originally negotiated because
25 it's performed.

1 Your Honor, that was my core points. I had a few
2 brief points that Mr. Cassell made in argument. I will try
3 to go through as quickly as possible.

4 He raised the point that you could base CVRA
5 rights on matters investigated. In re Wild says that's not
6 appropriate. I'm not aware of other cases, certainly none
7 from the Fifth Circuit, that say you can just base it on a
8 crime that was investigated.

9 In re Dean had a charged crime, ultimately, right?
10 For the plea agreement. So it had a charged crime. And
11 that's what In re Dean looked at it. And it was not
12 disputed that they were victims of that charged crime in
13 that case.

14 I think Mr. Cassell said at one point that we
15 don't dispute discovery is available under the CVRA. Just
16 to be clear, your Honor, we certainly do dispute there is no
17 right to discovery in that statute.

18 And the cases have, I believe, uniformly supported
19 that there's not the type of discovery right that
20 Mr. Cassell is seeking here. Even in the Jane Doe's case at
21 the district court level, the district court ultimately did
22 not order discovery based on the CVRA.

23 It was essentially agreed to by the government
24 under the inherent authority in that case, conceded in that
25 case. So we certainly do dispute that.

1 I think Mr. Cassell raised, for the first time
2 today, the notion about whether any report submitted by
3 Boeing to the department under the DPA, whether those would
4 be public. That's not been briefed to your Honor.

5 I would just say that is an HSBC case where the
6 district court had ordered reports submitted to be public
7 and that was part of what was overturned by the Second
8 Circuit in its decision. So I don't believe that would be
9 appropriate here.

10 And just briefly, on the arraignment and bond
11 argument. Your Honor, in coming into this area and
12 responding to Mr. Cassell's motions, we tried to do a very
13 thorough look.

14 The procedure your Honor used in this case is a
15 procedure that's commonly used in DPA matters, as we tried
16 to summarize in our brief.

17 In other words, courts routinely do not have
18 arraignment proceedings in DPA matters. They're not
19 required. You know, Rule 10 says, if an arraignment occurs,
20 it has to occur in open court, but it does not say an
21 arraignment must occur.

22 I think it's the judgment of the presiding judge
23 whether to conduct arraignment proceedings. It certainly
24 need not occur.

25 Mr. Cassell mentioned the Moore case from the

1 Fifth Circuit. That case is about waiver of arraignment.

2 We're not here to talk about waiver of arraignment.

3 It's whether arraignment need occur, and it
4 certainly need not occur for the reasons I've stated. So I
5 hope that responds to that argument.

6 Your Honor, with that, I'm thankful for the
7 Court's time --

8 THE COURT: I do have one question here --

9 MR. HATCH: Yes. Thank you.

10 THE COURT: -- as it relates to In re Dean. When
11 the circuit prudentially decided not to mandamus the
12 district judge, it seems to indicate that they were
13 confident that the district judge would dedicate the rights,
14 had heard from the victims in making the initial ruling, and
15 then there were more stages of the case to occur, and so
16 they were confident that the district judge would do that.

17 Is it the case here that, if I were to do nothing,
18 not change the status quo at all, but if I were to determine
19 they were crime victims, then, when the government filed a
20 Rule 41 motion, would I need to conduct a hearing and allow
21 the victims to come in and speak at that moment while I
22 considered or before I granted the Rule 41 motion? That's
23 what's envisioned in this Rule 41 motion, at the end of the
24 day.

25 Is that what I would do consistent with

1 In re Dean's reasoning or the background to their reasoning?

2 MR. HATCH: I don't think that it would be
3 necessary for the Court to do that. For the reason that I
4 don't believe a Rule 41 motion requires a hearing.

5 Obviously, the Court can order a hearing on any
6 issue. You know, any issue the Court wants to order a
7 hearing on. If the Court had determined they were victims,
8 then, you know, there might be a right to attend. I just
9 don't think, just like it's not necessary to hold an
10 arraignment, the Court could decide on the papers to rule on
11 a Rule 41 motion. That is not imminent. That's down the
12 road.

13 But I take your Honor's point. Certainly,
14 In re Dean allowed for participation prospectively, if you
15 will. It didn't go back and reopen, but it allowed for
16 participation prospectively.

17 We don't, respectfully, agree that they fall
18 within the scope of the CVRA, but Mr. Cassell has raised
19 prospective interest. If the Court were to find that, you
20 know, there could be things prospectively, I suppose, if the
21 Court were to find that they meet the statutory definition.

22 THE COURT: I'm just wondering if that was woven
23 into the background of the facts of In re Dean. Because,
24 again, they come to the prudential decision not to mandamus
25 the judge.

1 And as they're talking about it, they say that
2 they're confident that the district judge will allow
3 participation, has allowed, and will allow it going forward.
4 And so there were other proceedings that would take place.

5 And so the victims would be heard at those here.
6 As best I can tell, if nothing happens, the only
7 proceeding -- the only judicial act that will take place at
8 some day, at some point, is the filing of a Rule 41 motion
9 and the considering of it and presumably granting.

10 Would that be, if I were to follow sort of the
11 spirit of In re Dean, would I need to have a hearing?

12 MR. HATCH: That's ahead, so -- you know, but I
13 would suggest not, your Honor.

14 What I would say is this. I think the Court has
15 already approached this in the way that In re Dean mapped
16 out. The Court has allowed full briefing on four motions.
17 I think there may have been some other issues that came up,
18 the Court has allowed full briefing on all those.

19 The Court has sat and heard today arguments from
20 movants' counsel and many of the movants are represented
21 here. So the Court has fully heard the issues.

22 So I think the Court has done what the district
23 court did in In re Dean, which is let -- after the issue
24 came to light, let them participate in a court hearing,
25 which they did.

1 The difference is that a plea agreement is
2 fundamentally procedurally different from a DPA, right? A
3 plea agreement is going to have a hearing. The court
4 determines whether to accept the plea agreement.

5 And then a court is going to have sentencing, and
6 CVRA victims may have rights to attend and be heard at those
7 stages of the proceedings.

8 And that's why I go back to why you can't find
9 cases that do what Mr. Cassell asks, because a DPA does
10 not -- it's a deferral of prosecution. It's not going to
11 have those hearings.

12 There are not going to be stages when victims
13 would appear and be heard, assuming that the DPA has been
14 complied with and goes as expected. Ultimately, you have a
15 dismissal.

16 And on that, your Honor, I don't want to presume
17 on any briefing we have to submit a dismissal, but as HSBC
18 at least talks about, you know, a dismissal is not the
19 approval that I think Mr. Cassell is referring to. Do I
20 approve of this deal and, therefore, I dismiss it at the end
21 of compliance?

22 It's if the government made its motion to dismiss,
23 that is another matter in the prosecutor's discretion, and I
24 think the Court views it through that lens, as opposed to
25 some nebulous, do I approve of all of these proceedings and

1 what this deal was, if that makes sense, your Honor.

2 THE COURT: Okay. Very good. Thank you.

3 MR. HATCH: Thank you, your Honor.

4 THE COURT: Any rebuttal?

5 MR. CASSELL: I don't know if you would consider a
6 short bathroom break?

7 THE COURT: No, I'm sorry.

8 MR. CASSELL: All right. Let me dive right in.
9 My plan would be to follow the order of my initial
10 presentation and touching on what the parties have said
11 on that.

12 Remember, we had four arguments for why the
13 victims' families were crime victims under the CVRA. One of
14 them dealt with the ombudsman. It's important to recall the
15 ombudsman said, not only is there no crash investigation
16 now, but we will let you know in the future if an
17 investigation opens up. That never happened.

18 And so for that reason alone, you could conclude
19 that during that investigative process, the Justice
20 Department was at least reckless with what was going on.

21 But ultimately, when we get to now the drafting of
22 the DPA, I think your question touched on this, at some
23 point the government really is focusing on a resolution of
24 the charges. That's the point in time where it's quite
25 clear that they had conferral obligation.

1 We heard Mr. Duffy saying, well, you know, how do
2 we determine? When do we know? What is the limiting
3 principle? The limiting principle is, once you put pen to
4 paper with a criminal defendant and begin crafting an
5 agreement that says we're not going to prosecute you for
6 manslaughter, at that point, you need to talk to the victims
7 of that manslaughter crime.

8 You were really pushing the government to explain,
9 you know, does this cover manslaughter or not? I think you
10 ultimately got them to admit that they wouldn't be able to
11 prosecute Boeing for manslaughter under this agreement,
12 which is why the victims' families represent victims of
13 crime.

14 Now, we've heard a lot about In re Wild.
15 In re Wild, I found my notes here, I think all you need to
16 do with regard to -- here we go -- In re Wild, is take a
17 look at page 1252, note seven. 1252, note seven of In re
18 Wild, where the Eleventh Circuit says, look, we're not
19 creating a circuit split here.

20 We're not addressing the situation of In re Dean
21 where charges have been filed. At that point, victims can
22 come in. We're here in Case No. 4:21-CR-0005. We're here
23 in a criminal case, which we were in a civil case in the
24 Eleventh Circuit.

25 So now that leaves us with In re Dean. Again, I

1 think the key point with In re Dean is the Fifth Circuit was
2 looking at a situation where the district judge needed to do
3 something. That's a different situation than what you have.

4 You can make the world right today. You can give
5 those victims' families an opportunity to confer by agreeing
6 to the remedies that we've proposed. And then there
7 wouldn't be any need for any Fifth Circuit intrusion. In
8 the In re Dean case, the Fifth Circuit had to say, well, we
9 need to stay some proceedings here and then send it back to
10 see what's going on. I think that's the important
11 difference.

12 Now, remember the next argument that I made when I
13 was up here just a little bit ago, the risk argument, that
14 what Boeing did created a risk. Neither side, unless I
15 missed it, responded to that argument, but I think your
16 questions actually opened up, unlocked the key to that
17 holding.

18 You've identified two statements of facts in the
19 DPA, which both sides agree you can look at, that say MCAS
20 may have played a role.

21 We think things actually went much further. It
22 did play a role. And that's what the official investigative
23 authorities found, but let's just go with may have played a
24 role, artful pleading by, I suppose, by Boeing and the
25 government. Well, that's a risk.

1 When those passengers and crew are on those
2 flights and MCAS may have played a role, they wanted to know
3 everything they could, but because of Boeing's conspiracy,
4 they didn't have the information.

5 So you can simply say, based on the undisputed
6 facts here, MCAS may have played a role, that created a
7 risk. The CVRA says, if you are creating risk to people
8 criminally, they are harmed. And therefore, crime victim
9 status exists.

10 So I think you have a path forward without
11 ordering further evidentiary hearings or anything along
12 those lines where you would find that the family members
13 represent victims.

14 But if you want further evidentiary findings, our
15 position is, bring it on. We are ready. Nobody talked
16 about our 53 pages of facts, even though we spent a lot of
17 time putting them together for your benefit, and we thought
18 for the benefit of the parties, so they could help narrow
19 the issues and tell us what they are disputing.

20 And again, today we've gotten, well, we don't
21 agree, but we won't tell you which facts we're specifically
22 objecting to. Those facts cover every link in the chain
23 from the FAA, ordering simulator training, to having it
24 apply to foreign carriers, to having those carriers then be
25 able to safely land the planes.

1 So if we wanted to look at all that, let's bring
2 it on. Let's have an evidentiary hearing, and we will show
3 the government lots of evidence that apparently they've been
4 unable to find so far.

5 Now, the one thing we did hear from the government
6 today is, oh, look, there are lots of other causes out
7 there. The government is conflating what the inquiry is in
8 front of you, with all respect.

9 The issue is not whether there were multiple
10 causes of the crashes. There clearly were. The only issue
11 is whether MCAS was a cause of the crash. We've cited lots
12 of authority that says under general but-for causation, you
13 don't have to find just one single cause. I mean, the world
14 is involving, you know, multiple different causes that
15 always come together on any particular event.

16 So MCAS was clearly a cause. We have great
17 evidence on that. What we hear from the government is, oh,
18 remember in the Forkner case, we really didn't hear a lot of
19 evidence about the crashes.

20 Well, you know why that happened. Everybody knows
21 why that happened, because on Thursday the government filed
22 a superseding indictment in that case that eliminated any
23 reference to the crashes.

24 And then we're told today, well, see, there really
25 wasn't a lot of connection to the crashes. Of course there

1 wasn't, because the government was structuring the case, for
2 reasons that are unclear to us, to be very, very narrow, and
3 not include the deaths of 346 people.

4 So that case, whatever it holds, we don't know
5 what the jury ultimately decided, has no bearing on this
6 case, which very directly involves the crashes.

7 So let's have an evidentiary hearing if there's
8 some dispute. We will put on evidence. We will prove
9 beyond any doubt or certainly beyond a preponderance of the
10 evidence, which is all that we would have to meet, that
11 there was a direct and proximate harm.

12 We did hear some discussion from the government
13 about proximate harm. Your Honor is well familiar with tort
14 law standards. When there is a harm that is created, the
15 question is whether the ultimate harm that resulted is
16 within that zone of foreseeability.

17 When Boeing lied to aviation safety regulators
18 about causes that could have catastrophic consequences,
19 that's clearly within the zone of foreseeability. And we've
20 mentioned government -- I'm sorry, Boeing documents at six
21 points mention MCAS being linked to potential catastrophic
22 failures. Clearly, the harms that befell 346 innocent
23 people here were entirely foreseeable.

24 If there's any doubt on whether we have enough
25 evidence, we also think the government should be required to

1 disclose evidence. It's interesting they said, well, down
2 in Florida we agreed to disclose evidence. So it wasn't
3 litigated there.

4 Begging the question of why aren't they agreeing
5 to disclose evidence here? And begging the question of how
6 could this Court possibly rule on whether there's sufficient
7 evidence in this case if the government is concealing
8 evidence, which I think it became clear today they intend
9 to do.

10 So for all those reasons, we think that you should
11 find that the victims' families here representing crash
12 victims who are CVRA crime victims.

13 And then we get into the issue of, you know, what
14 is the appropriate remedy here?

15 Let me just clear up one thing. We very much
16 appreciate Attorney General Garland meeting with the
17 victims' families. That was very generous of his time to do
18 that.

19 But let me also be clear. We asked to turn that
20 meeting into a conferral session. We said we want to have a
21 give-and-take discussion about this agreement.

22 We were told specifically no. This is solely a
23 listening session. And without going into the details of
24 our meeting with Attorney General Garland, he welcomed us
25 there, we made a presentation. He said thank you very much.

1 I'll be back with you later. That is not conferral.

2 Whatever else it is, we appreciate his time. That was not
3 conferral.

4 Again, we appreciate your time today having us in
5 to argue our motions, but that is not a right to confer. We
6 want to confer with those decision makers. You heard them
7 say today, we did not encounter any evidence that Boeing's
8 management was responsible for the deaths of 346 people.

9 But we have lots of information that apparently
10 they don't, and we want to show it to them. Maybe they will
11 end up saying, well, we just disagree with your
12 interpretation.

13 But we were promised by Congress an opportunity to
14 confer with the decision maker before final decisions were
15 made in this case. And that is the remedy that you should
16 give us.

17 You should set aside the nonprosecution provision
18 or the deferred prosecution provision and give us an
19 opportunity to meaningfully confer with prosecutors to hold
20 Boeing accountable.

21 Now, where is your authority to do that? The
22 CVRA, for all the reasons I've explained, gives you that
23 authority. But I did think -- maybe I misunderstood what
24 the government was saying, but I think we heard a very
25 significant change in the government's position today from

1 what I was seeing in their briefs to what they were saying.

2 If I heard Mr. Duffy correctly, he said you do
3 have authority to direct -- to reject the DPA. That is
4 significant. You do have authority.

5 And so then the only question is, well, when would
6 you do that? We heard from the government, well, it should
7 be something significant.

8 How about a violation of congressionally promised
9 rights to 346 grieving families around the world in a case
10 involving the deaths of their family members?

11 I mean, I can't come up with a law professor's
12 hypothetical that is a more significant reason for setting
13 aside a DPA than something like that. And that's exactly
14 what you have here.

15 That's presumably why Senator Cruz wrote in to say
16 this is a very significant case that warrants your
17 supervisory power to take a close look at what happened
18 here.

19 So I think we have the government admission that
20 you have a basis for setting aside this agreement. They've
21 even apologized for what happened in the course of executing
22 this agreement. Why that isn't an unusual circumstance that
23 would justify setting aside the agreement, I can't
24 understand.

25 We do hear from Boeing, oh, there's never been a

1 case like this. We can't find any precedent. Right.
2 That's because this was unprecedented. The government
3 concealing what it was doing in a case involving 346
4 homicides for more than a year. That's unprecedented and
5 that warrants your supervisory power here.

6 And then the last point, holding an arraignment.
7 I think your Honor has mentioned that, if an arraignment was
8 held, victims would have an opportunity to come in
9 potentially. We look forward to that opportunity and we
10 hope that you will grant our motion on that with respect to
11 the arraignment.

12 THE COURT: Okay. I apologize for not taking all
13 of this up at the very beginning. I clearly should have at
14 least inquired at the beginning and I failed in that regard.
15 So I apologize for that.

16 But I've reviewed all of your filings, and I
17 appreciate you all coming in here to make this argument. I
18 appreciate you all traveling to Fort Worth to do that.

19 I will take it all under advisement, reflect on
20 it, and get an order out just as soon as I can.

21 Anything else from anybody?

22 MR. DUFFY: No, your Honor. Thank you, your
23 Honor.

24 MR. HATCH: No, your Honor.

25 THE COURT: All right. Thank you.

1 (The proceedings concluded at 11:59 a.m.)

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REPORTER'S CERTIFICATE

I, ZOIE WILLIAMS, RMR, RDR, FCRR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter to the best of my ability to hear.

Further, due to the COVID-19 pandemic, some participants are wearing masks, and/or appeared via videoconferencing, so proceedings were transcribed to the best of my ability.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 9th day of May, 2022.

_____/s/ Zoie Williams_____
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MR. CASSELL: [54] 3/20

3/25 5/2 5/10 29/25
 34/23 35/8 35/11 35/14
 35/16 35/23 39/20 41/10
 41/14 42/11 42/16 42/22
 43/3 43/16 43/19 43/21
 43/23 43/25 44/3 44/9
 44/13 44/16 44/19 44/21
 44/23 45/7 45/15 45/18
 46/1 47/16 47/18 47/23
 48/4 48/14 48/22 49/13
 49/18 51/3 51/10 51/13
 51/16 51/19 52/3 52/7
 52/24 54/3 54/7 127/5
 127/8

MR. DUFFY: [53] 4/12

56/18 70/1 81/4 81/17
 83/5 84/22 85/4 85/7
 85/12 85/20 86/1 88/14
 88/21 89/8 91/15 91/22
 92/2 92/5 92/9 92/24
 93/11 96/8 96/15 96/18
 96/20 96/22 96/25 97/2
 97/7 98/14 98/24 99/10
 100/3 100/6 100/9 101/3
 101/12 101/21 101/24 102/3
 102/5 102/9 102/13 103/6
 103/10 103/20 105/10
 105/13 105/20 106/3
 106/11 136/22

MR. HANEY: [1] 4/18**MR. HATCH: [9]** 4/16

4/21 107/8 107/21 123/9
 124/2 125/12 127/3 136/24

MR. NICHOLSON: [1]
3/8**MR. SANTOS: [1]** 4/20**MS. APPLEBAUM: [1]**

3/13

MS. BAUER: [1] 4/24**MS. BRAMMEIER: [1]**

3/16

THE COURT: [119] 3/4

3/12 3/15 3/18 3/24 4/10
 4/14 4/23 4/25 5/8 29/24
 34/21 34/24 35/9 35/12
 35/15 35/21 39/7 41/8
 41/13 41/19 42/14 42/21
 43/2 43/5 43/17 43/20
 43/22 43/24 44/1 44/7
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 127/4 127/7 136/12 136/25

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 32/11 32/15 32/16 37/20
 42/18 51/18 68/9 68/21
 113/11 122/19
10-K [1] 9/3
100 [3] 2/23 81/22 81/23
10017 [1] 2/11
10th [3] 8/19 13/7 138/20
11 [4] 10/6 51/7 51/15
 75/12

11:59 a.m [1] 137/1**120 [1]** 2/14**120-page [2]** 46/9 48/23**123 [1]** 38/9**1252 [2]** 128/17 128/17**13 [1]** 72/10**13-year [1]** 35/17**1301 [1]** 2/20**14 [3]** 31/3 54/20 55/2**14-day [2]** 54/22 55/5**1500 [1]** 2/23**157 [1]** 13/9**16 [1]** 61/3**1700 [1]** 1/21**18 [2]** 57/3 59/20**189 [1]** 12/17**19 [1]** 138/8**1993 [1]** 16/19**1994 [1]** 33/5**2****2-1 [1]** 38/11**2.5 billion [1]** 40/15**20 [1]** 68/23**200 [1]** 48/10**20004 [1]** 2/21**2004 [2]** 5/22 55/12**2008 [2]** 45/19 50/4

<p>2</p> <p>2010-era [1] 86/19</p> <p>2011 [3] 7/13 17/1 36/13</p> <p>2013 [6] 36/20 36/24 47/10 50/2 50/3 50/5</p> <p>2014 [1] 36/25</p> <p>2015 [2] 37/5 45/21</p> <p>2016 [2] 27/22 61/13</p> <p>2018 [3] 8/19 11/2 12/15</p> <p>2019 [7] 8/20 13/7 37/6 37/10 37/17 37/17 37/18</p> <p>202.239.5921 [1] 2/21</p> <p>2020 [2] 9/4 71/2</p> <p>2021 [1] 60/25</p> <p>2022 [3] 1/8 3/2 138/15</p> <p>212.972.9432 [1] 2/12</p> <p>23 [1] 32/4</p> <p>23219 [1] 2/18</p> <p>24 [1] 119/12</p> <p>24th [1] 72/10</p> <p>28th [1] 2/11</p> <p>29th [2] 8/19 12/15</p> <p>2d [1] 64/9</p>	<p>383 [1] 2/5</p> <p>4</p> <p>41 [6] 123/20 123/22 123/23 124/4 124/11 125/8</p> <p>44 [1] 14/15</p> <p>466 [1] 63/19</p> <p>469.904.4550 [1] 2/9</p> <p>480.375.8992 [1] 2/24</p> <p>485 [1] 2/11</p> <p>49 [2] 88/24 119/12</p> <p>4:21-cr-00005-O-1 [1] 1/6</p> <p>4:21-CR-0005 [1] 128/22</p> <p>5</p> <p>500 [1] 2/8</p> <p>501 [1] 138/20</p> <p>53 [2] 88/24 130/16</p> <p>53-page [1] 15/22</p> <p>532 [1] 138/20</p> <p>597 [2] 62/22 86/21</p> <p>6</p> <p>6-3 [1] 54/4</p> <p>60602 [1] 2/14</p> <p>610 [4] 12/16 56/22 64/8 108/6</p> <p>640 F.3d [1] 63/9</p> <p>648 [1] 63/9</p> <p>688 [1] 64/9</p> <p>6:32 a.m [2] 12/15 12/18</p>	<p>8</p> <p>8-5 [1] 38/13</p> <p>800 [1] 2/17</p> <p>801 [1] 1/21</p> <p>801.585.5202 [1] 2/6</p> <p>817.252.5200 [1] 1/22</p> <p>817.850.6630 [1] 138/21</p> <p>84112 [1] 2/5</p> <p>8:39 a.m [1] 13/7</p> <p>9</p> <p>900 [1] 2/8</p> <p>918 [1] 63/18</p> <p>9:02 [1] 1/10</p> <p>9th [1] 138/15</p> <p>A</p> <p>a.m [5] 1/10 12/15 12/18 13/7 137/1</p> <p>Ababa [1] 13/9</p> <p>ability [5] 14/11 33/22 40/6 138/7 138/11</p> <p>able [12] 8/25 15/16 26/2 41/24 62/3 79/19 80/4 80/5 86/10 91/5 128/10 130/25</p> <p>aboard [2] 12/16 13/8</p> <p>about [93] 8/23 9/14 10/3 12/22 15/2 18/2 19/2 19/15 19/18 24/23 25/16 25/22 25/24 30/18 35/1 39/7 40/3 40/11 40/20 43/9 45/11 48/23 49/19 50/21 57/6 57/22 61/11 61/16 61/22 62/5 65/6 65/15 66/5 67/19 68/17 70/2 70/2 71/14 71/24 72/16 73/11 78/13 78/17 78/19 82/24 83/12 83/17 89/24 90/1 90/6 92/2 93/24 93/25 94/4 94/23 95/1 95/8 95/22 96/24 97/19 97/24 97/25 104/5 106/11</p>
<p>3</p> <p>300-something [1] 97/17</p> <p>302 [3] 13/8 56/23 108/7</p> <p>3142 [1] 33/18</p> <p>3161 [4] 26/18 26/23 26/23 105/19</p> <p>336 [1] 67/22</p> <p>344 [1] 86/21</p> <p>346 [10] 6/18 9/23 15/18 16/21 17/16 132/3 132/22 134/8 135/9 136/3</p> <p>351 [2] 62/22 86/22</p> <p>364 [1] 11/22</p> <p>3663 [1] 104/20</p> <p>36th [1] 2/14</p> <p>371 [2] 57/3 59/20</p> <p>3771 [7] 18/15 51/8 51/9 54/6 54/19 54/19 108/14</p>	<p>7</p> <p>72 [2] 45/13 45/14</p> <p>737 [1] 14/18</p> <p>737 MAX [1] 66/25</p> <p>75202 [1] 2/8</p> <p>757.640.3727 [1] 2/18</p> <p>76 [1] 16/1</p> <p>76102 [3] 1/22 2/24 138/20</p> <p>7th [1] 60/25</p>	

A	115/20 115/22 125/7	advance [2] 82/22 83/4
about... [29] 106/12	acted [1] 99/21	advanced [3] 8/8 12/6
108/23 108/23 112/19	action [3] 35/4 113/14	36/19
112/25 113/1 113/18 114/6	114/7	advancing [1] 36/18
114/14 115/3 115/7 115/8	activated [4] 12/19 13/10	advisement [1] 136/19
115/23 116/12 117/12	85/10 88/25	advisory [1] 32/16
117/18 119/5 122/2 123/1	activation [1] 13/18	AEG [11] 14/4 57/5 66/2
123/2 125/1 126/18 128/14	actors [1] 97/22	66/7 90/17 90/20 117/18
130/16 131/19 132/13	actual [1] 118/22	117/22 118/13 118/15
132/18 133/21 135/8	actually [13] 43/8 49/3	118/17
absolute [1] 16/6	50/16 67/13 80/14 102/20	affected [2] 64/2 89/13
accede [2] 67/25 101/18	107/15 109/18 112/6 112/24	affidavits [1] 10/2
acceded [1] 60/12	119/1 129/16 129/21	affirmatively [1] 61/22
accept [5] 72/6 110/19	add [1] 50/11	affirmed [1] 112/17
111/1 111/19 126/4	added [1] 10/20	afforded [3] 18/19 22/3
accepted [2] 46/15 111/9	Addis [1] 13/9	22/17
accident [2] 118/12 119/1	addition [6] 18/12 22/14	afield [1] 100/18
accidents [5] 108/4 117/13	23/13 25/6 28/8 40/5	afoul [1] 65/3
117/19 117/23 118/23	additional [7] 33/24 74/18	after [9] 9/1 13/12 14/7
accomplish [1] 73/4	76/19 76/25 80/9 104/21	20/11 58/5 59/9 78/24
accordance [1] 62/20	104/22	101/16 125/23
account [1] 120/11	address [10] 43/11 68/15	again [36] 6/13 8/15 8/22
accountable [3] 56/16	69/21 70/24 73/12 80/22	9/19 11/13 12/9 13/3 13/10
98/2 134/20	81/24 96/2 107/21 138/20	13/14 14/19 16/1 16/24
accuracy [1] 67/25	addressed [2] 110/24	24/3 25/17 29/16 29/22
accurate [6] 69/16 71/6	110/25	33/3 34/14 44/3 54/13
71/9 71/10 71/13 71/20	addressing [1] 128/20	62/18 75/25 76/16 86/5
accurately [1] 71/15	adequately [2] 86/12	86/13 86/19 86/21 89/16
acknowledge [3] 33/11	86/12	89/17 90/18 90/22 111/4
72/5 72/7	adhere [1] 84/24	124/24 128/25 130/20
acknowledged [1] 70/7	adjacent [1] 32/11	134/4
acknowledges [2] 23/8	administrative [1] 104/3	against [9] 13/2 13/17
108/3	admissible [1] 58/9	28/18 58/14 59/24 63/18
acknowledging [1] 28/5	admission [1] 135/19	79/21 88/20 96/5
acquitted [1] 61/4	admit [1] 128/10	ago [6] 54/2 57/6 71/25
across [2] 61/20 69/4	admitted [8] 6/10 9/23	75/10 83/8 129/13
act [27] 5/12 5/20 5/22	13/23 14/16 58/3 58/18	agree [9] 23/7 70/5 76/10
7/1 7/10 10/15 10/17 14/22	62/25 88/7	105/8 105/10 105/24
25/24 25/25 26/15 66/16	admittedly [1] 61/5	124/17 129/19 130/21
72/11 75/17 84/16 105/7	admonition [1] 54/5	agreed [13] 19/21 52/22
105/19 106/4 112/3 114/21	adopt [1] 43/4	73/3 73/18 74/3 78/22
115/3 115/7 115/10 115/14	adopting [1] 79/2	78/25 80/2 93/21 100/9

<p>A</p> <p>agreed... [3] 110/25 121/23 133/2</p> <p>agreeing [3] 30/23 129/5 133/4</p> <p>agreement [75] 6/5 10/23 10/25 11/16 11/19 19/19 19/25 26/20 26/24 27/9 27/10 27/20 28/16 29/19 30/8 34/4 35/24 36/22 38/5 39/8 39/9 39/11 39/19 39/25 40/11 40/21 40/24 41/9 41/11 42/25 45/16 47/20 47/20 47/25 48/1 48/17 49/4 49/9 49/16 49/19 49/22 62/4 72/13 72/17 72/21 75/6 75/8 75/11 79/2 81/2 96/4 98/12 103/8 109/25 110/11 110/20 111/13 111/17 111/24 112/1 112/22 114/18 115/13 116/10 120/1 121/10 126/1 126/3 126/4 128/5 128/11 133/21 135/20 135/22 135/23</p> <p>agreements [9] 11/15 26/16 29/9 52/2 55/4 99/1 111/15 116/8 120/3</p> <p>agrees [1] 40/6</p> <p>ahead [6] 33/7 33/9 69/25 70/1 101/11 125/12</p> <p>aimed [1] 66/19</p> <p>Air [7] 12/16 13/13 56/22 67/8 100/1 100/1 108/6</p> <p>airbag [1] 73/22</p> <p>aircraft [4] 12/19 12/21 13/11 66/25</p> <p>airline [2] 73/25 88/25</p> <p>airlines [9] 13/8 56/22 66/20 66/21 66/22 85/16 90/21 104/25 120/16</p> <p>airworthiness [1] 61/18</p>	<p>alien [1] 63/23</p> <p>alien-smuggling [1] 63/23</p> <p>align [1] 50/19</p> <p>all [86] 3/5 3/5 3/18 4/10 4/11 4/25 4/25 5/10 12/1 15/20 15/23 18/5 18/10 20/23 21/5 22/5 22/12 26/13 31/22 32/24 34/3 35/17 38/3 39/1 41/1 42/25 44/20 48/2 48/8 51/7 51/12 51/24 57/6 57/20 58/13 60/18 61/6 64/13 65/13 65/17 65/17 66/2 66/17 67/24 78/2 78/11 81/24 84/25 86/13 88/18 91/14 94/4 94/13 94/25 95/22 97/12 98/6 100/20 103/12 103/20 107/24 108/5 110/24 111/1 112/1 113/25 115/16 118/13 118/20 118/25 123/18 125/18 126/25 127/8 128/15 131/1 131/8 132/10 133/10 134/22 136/12 136/16 136/17 136/18 136/19 136/25</p> <p>alleged [2] 92/7 117/22</p> <p>allow [5] 96/12 105/24 123/20 125/2 125/3</p> <p>allowed [8] 77/12 110/15 110/16 124/14 124/15 125/3 125/16 125/18</p> <p>allows [3] 72/25 72/25 73/1</p> <p>almost [9] 30/14 58/13 61/6 68/9 68/13 68/21 81/22 112/13 115/18</p> <p>alone [5] 12/25 89/3 89/14 95/25 127/18</p> <p>along [2] 106/16 130/11</p> <p>already [9] 10/16 47/19 50/23 101/6 110/9 110/11</p>	<p>112/19 114/22 125/15</p> <p>also [36] 3/21 3/22 4/5 4/21 5/6 5/17 6/16 11/1 13/1 14/14 15/25 16/23 18/13 20/17 21/24 28/20 37/23 40/6 65/23 66/7 66/12 72/12 72/12 86/2 90/7 90/8 92/6 93/11 104/15 115/23 116/18 116/24 120/5 120/7 132/25 133/19</p> <p>although [4] 23/6 49/3 106/4 109/20</p> <p>always [4] 32/2 51/7 51/8 131/15</p> <p>am [6] 36/9 42/15 83/9 100/13 100/15 100/24</p> <p>ambit [1] 80/14</p> <p>amended [1] 119/12</p> <p>amending [1] 10/21</p> <p>AMERICA [2] 1/6 30/10</p> <p>amicus [6] 20/19 25/18 29/15 64/19 68/19 76/4</p> <p>among [2] 11/23 52/19</p> <p>amount [2] 39/17 116/20</p> <p>analogy [1] 104/20</p> <p>analysis [5] 60/15 63/4 63/18 90/12 94/1</p> <p>ancillary [1] 65/12</p> <p>announced [1] 54/1</p> <p>announcement [2] 9/8 10/13</p> <p>another [16] 10/6 12/5 13/6 13/7 40/14 43/6 55/24 60/10 87/8 87/8 89/5 90/16 118/8 118/14 120/5 126/23</p> <p>answer [7] 17/15 26/14 44/4 49/18 82/20 94/2 108/25</p> <p>ante [1] 103/12</p> <p>anti [1] 92/12</p>
---	--	---

<p>A anti-paramilitary [1] 92/12 anticipating [1] 22/15 Antrobus [1] 117/7 any [55] 6/7 6/17 6/18 8/3 8/4 12/10 15/5 15/14 16/5 17/20 18/8 31/2 31/11 32/23 33/3 33/15 33/19 34/17 36/5 40/3 40/9 40/10 44/8 46/3 55/17 58/5 63/1 68/20 68/23 69/23 75/6 77/10 80/22 92/22 92/25 104/3 104/4 107/18 107/19 111/10 116/9 119/19 122/2 124/5 124/6 126/17 127/4 129/7 129/7 131/15 131/22 132/9 132/24 134/7 136/1 anybody [2] 71/21 136/21 anything [13] 12/1 25/16 33/15 37/20 40/3 46/11 53/1 79/12 83/24 98/3 103/17 130/11 136/21 AOA [4] 67/1 67/9 67/14 86/10 apologize [3] 71/21 136/12 136/15 apologized [2] 6/11 135/21 apologizes [2] 59/1 70/25 apparently [6] 37/17 86/13 86/13 91/5 131/3 134/9 appeal [5] 50/25 93/10 112/17 114/13 117/6 appealed [1] 44/14 appeals [5] 35/6 70/10 70/13 80/13 92/15 appear [2] 31/1 126/13 appearance [1] 32/12 appeared [1] 138/9 appears [1] 88/24 appellate [4] 2/4 45/23</p>	<p>46/3 114/17 APPLEBAUM [2] 27/10 39/14 applicable [2] 55/22 116/9 application [2] 18/12 18/13 applied [1] 38/4 applies [2] 11/3 49/8 apply [5] 8/5 34/17 49/15 55/2 130/24 appointment [1] 51/14 appreciate [7] 5/3 98/20 133/16 134/2 134/4 136/17 136/18 approached [1] 125/15 approaches [1] 11/15 appropriate [19] 16/16 21/9 29/20 34/12 41/25 56/15 60/24 61/1 65/14 69/14 72/12 75/1 76/24 78/5 80/12 103/2 121/6 122/9 133/14 approval [13] 26/21 26/22 26/24 27/1 27/3 27/8 29/19 67/15 106/2 114/23 114/25 115/8 126/19 approve [7] 27/10 39/25 40/11 114/16 114/19 126/20 126/25 approved [2] 87/7 99/19 approximately [5] 58/15 61/13 67/22 78/4 87/5 arbiter [1] 104/9 are [156] area [1] 122/11 aren't [4] 21/20 32/14 41/1 133/4 argue [1] 134/5 argued [6] 7/12 11/1 16/25 19/10 49/1 58/12 arguing [2] 46/13 54/15 argument [28] 8/6 12/5 12/7 12/12 12/13 15/9 24/6 27/11 27/15 28/3 28/4</p>	<p>38/11 46/11 51/2 52/14 54/15 76/21 110/3 112/19 113/3 115/19 121/2 122/11 123/5 129/12 129/13 129/15 136/17 arguments [15] 8/8 8/11 15/5 15/12 16/6 36/18 48/24 50/2 50/3 79/13 110/17 111/1 112/12 125/19 127/12 arise [1] 74/20 around [5] 5/13 9/23 10/8 53/1 135/9 arraign [1] 33/14 arraigned [3] 31/10 32/21 33/17 arraignment [35] 5/18 30/1 30/4 30/9 30/12 30/17 30/24 31/5 31/19 31/20 31/23 31/25 32/10 32/13 32/18 34/8 34/9 55/1 76/7 76/7 76/10 76/11 77/16 122/10 122/18 122/19 122/21 122/23 123/1 123/2 123/3 124/10 136/6 136/7 136/11 arraignments [1] 51/17 array [2] 69/1 69/6 arrested [1] 37/16 arrive [1] 62/16 arrived [1] 106/15 artful [1] 129/24 article [4] 29/2 29/6 35/18 113/4 articles [1] 97/19 as [142] aside [25] 5/8 19/25 20/1 36/21 39/7 42/1 48/18 49/5 49/10 49/16 49/22 50/13 54/11 56/12 103/9 103/22 105/16 105/22 106/7 113/4 113/5 134/17</p>
--	---	---

<p>A</p> <p>aside... [3] 135/13 135/20 135/23</p> <p>ask [24] 20/23 25/3 29/21 34/19 34/21 39/7 41/14 43/3 43/6 64/2 70/8 74/9 75/21 80/23 81/12 82/7 84/10 85/8 91/8 94/4 96/2 99/6 100/22 117/24</p> <p>asked [20] 26/5 47/21 51/8 68/16 70/2 71/24 73/11 97/4 100/15 100/16 100/21 107/16 109/12 112/19 114/14 116/12 117/11 119/4 120/7 133/19</p> <p>asking [16] 17/24 41/5 41/6 47/2 47/4 49/19 49/21 49/25 53/14 100/4 103/13 119/5 119/6 119/8 119/10 119/21</p> <p>asks [2] 108/22 126/9</p> <p>aspect [1] 116/1</p> <p>aspects [6] 24/8 25/19 26/11 89/18 89/18 90/1</p> <p>asserted [1] 56/4</p> <p>assertion [1] 8/22</p> <p>assertions [2] 69/19 77/11</p> <p>assess [2] 113/20 117/1</p> <p>assessing [1] 109/6</p> <p>assessment [2] 60/21 117/18</p> <p>assigned [1] 48/5</p> <p>assistance [2] 16/2 16/4</p> <p>ASSISTANT [1] 1/20</p> <p>assume [7] 21/7 88/16 96/11 98/5 100/2 100/5 109/14</p> <p>assumed [1] 70/7</p> <p>assuming [7] 11/21 24/17 76/13 76/16 118/9 118/9 126/13</p> <p>astonishing [1] 24/12</p>	<p>at [151]</p> <p>attack [1] 63/25</p> <p>attempted [2] 79/25 87/4</p> <p>attend [2] 124/8 126/6</p> <p>attention [4] 20/17 29/3 54/19 85/13</p> <p>attenuated [2] 63/8 117/8</p> <p>attorney [13] 1/19 1/20 6/4 45/19 58/6 59/11 65/4 101/6 104/8 104/9 108/15 133/16 133/24</p> <p>attorneys [2] 23/14 30/6</p> <p>August [1] 37/17</p> <p>authorities [4] 7/11 13/15 22/22 129/23</p> <p>authority [31] 24/10 26/14 26/16 28/25 29/17 33/4 36/10 38/9 70/8 71/23 74/9 74/12 74/25 75/3 75/5 75/16 105/7 105/9 105/21 105/23 105/25 106/6 109/15 115/25 116/5 121/24 131/12 134/21 134/23 135/3 135/4</p> <p>authorize [3] 31/18 53/25 73/15</p> <p>available [5] 14/18 20/16 20/21 58/23 121/15</p> <p>Avenue [2] 2/11 2/20</p> <p>aviation [1] 132/17</p> <p>avoid [3] 18/9 21/8 38/20</p> <p>avoids [1] 30/8</p> <p>award [2] 17/20 36/15</p> <p>awarded [2] 87/23 88/3</p> <p>aware [12] 5/17 8/17 23/13 23/14 32/20 42/15 50/18 67/6 100/13 100/14 100/15 121/6</p> <p>away [3] 43/15 87/5 113/9</p> <hr/> <p>B</p> <hr/> <p>back [34] 37/3 41/1 41/3 41/15 42/25 46/5 46/8</p>	<p>49/23 55/12 63/24 75/21 79/22 81/19 83/7 86/17 87/17 94/3 95/15 95/20 97/14 98/8 103/16 107/3 110/14 110/22 111/8 112/8 120/19 120/19 120/23 124/15 126/8 129/9 134/1</p> <p>background [3] 112/14 124/1 124/23</p> <p>bad [1] 67/14</p> <p>banc [7] 38/12 38/13 38/16 39/2 65/7 113/11 113/13</p> <p>bank [5] 87/3 87/3 87/4 87/8 87/9</p> <p>bargain [5] 28/10 29/8 46/14 46/25 48/17</p> <p>bargaining [4] 11/8 37/1 48/12 48/13</p> <p>base [2] 121/4 121/7</p> <p>based [25] 14/19 15/6 40/11 41/11 52/22 58/17 60/21 62/13 62/24 63/1 64/3 66/20 66/22 68/25 78/5 85/16 85/17 89/4 97/7 101/15 105/14 105/16 106/7 121/22 130/5</p> <p>basement [1] 62/16</p> <p>basic [1] 34/24</p> <p>basically [2] 82/9 83/13</p> <p>basis [14] 63/5 66/14 92/19 93/22 102/5 102/7 102/22 106/8 107/2 113/25 115/23 115/24 119/21 135/20</p> <p>bathroom [1] 127/6</p> <p>BAUER [2] 2/16 4/24</p> <p>be [186]</p> <p>Bean [1] 28/14</p> <p>bearing [1] 132/5</p> <p>bears [1] 93/5</p> <p>became [2] 89/18 133/8</p>
---	--	---

<p>B because [90] 5/12 7/17 9/24 15/3 15/9 15/14 18/1 18/9 28/10 28/19 30/15 30/20 33/17 33/20 34/1 34/2 35/13 36/16 37/23 38/4 39/9 40/21 42/12 43/7 43/11 44/24 45/13 47/21 49/5 49/18 49/23 51/6 51/11 57/11 57/25 58/22 60/15 61/25 62/18 64/17 65/11 65/16 66/1 67/18 68/10 72/2 72/3 73/14 74/18 75/10 81/9 82/2 83/12 84/3 85/9 86/13 87/14 88/5 88/10 88/17 88/18 89/10 93/9 94/18 96/18 96/23 97/8 98/7 99/20 101/24 104/7 105/13 111/3 112/8 112/23 113/4 113/8 115/5 116/25 118/1 118/17 120/20 120/23 120/24 124/23 126/9 130/3 131/21 132/1 136/2 become [1] 33/20 becomes [5] 27/2 27/9 45/18 49/20 79/19 been [65] 8/18 8/23 8/24 10/1 17/2 20/19 21/17 29/18 33/2 34/1 34/17 34/18 35/3 37/6 37/12 37/20 46/12 46/13 51/8 52/21 60/8 60/18 60/19 65/20 71/3 71/12 71/13 71/20 74/15 75/18 75/20 76/4 76/18 78/15 86/24 87/21 88/3 88/17 89/5 93/15 95/2 95/6 97/18 102/20 104/22 105/15 109/24 109/24 109/24 110/6 110/9 110/11 111/4 111/5 111/9 112/1 112/3</p>	<p>115/17 118/13 122/4 125/17 126/13 128/21 131/3 135/25 befell [1] 132/22 before [23] 1/14 11/3 23/12 24/19 25/8 25/12 25/22 36/13 46/14 49/20 59/2 61/12 70/12 77/23 81/2 84/13 84/20 103/12 108/8 109/3 116/2 123/22 134/14 began [2] 8/20 9/2 begging [2] 133/4 133/5 begin [4] 77/24 107/23 107/25 128/4 beginning [2] 136/13 136/14 behalf [3] 3/9 4/17 107/9 behind [1] 120/4 being [13] 3/5 3/19 4/10 4/14 11/17 24/24 26/3 56/5 63/24 79/6 79/25 80/19 132/21 believe [13] 8/7 36/12 58/8 60/23 84/22 84/22 94/15 95/24 100/12 119/22 121/18 122/8 124/4 believed [5] 59/24 60/16 62/2 69/4 96/7 belongs [2] 51/21 51/21 Ben [2] 4/16 107/8 beneficiaries [1] 59/2 benefit [5] 78/2 107/11 111/10 130/17 130/18 benefits [1] 77/7 BENJAMIN [1] 2/15 Berthet [1] 4/2 best [8] 16/24 22/16 22/19 55/25 84/9 125/6 138/7 138/11 better [5] 8/6 33/24 50/3 52/6 105/4</p>	<p>between [9] 16/21 26/3 34/2 64/5 67/19 72/19 79/25 88/1 106/21 beyond [15] 7/14 7/19 17/2 17/5 58/9 59/24 62/2 80/5 93/19 97/22 104/16 114/1 114/3 132/9 132/9 bid [2] 88/18 88/18 big [2] 46/9 48/22 bill [1] 5/24 billion [1] 40/15 bind [1] 98/12 bit [6] 8/23 35/9 65/6 65/15 81/19 129/13 blame [1] 51/20 block [1] 10/10 blocking [1] 36/22 board [1] 13/9 body [1] 112/14 BOEING [93] 1/9 2/15 4/15 4/17 4/19 9/4 10/10 11/22 14/1 14/15 19/3 20/7 20/14 22/8 25/23 26/3 27/17 27/18 30/6 30/7 30/17 31/10 32/24 33/14 33/17 33/19 33/21 34/2 34/6 34/13 40/15 40/16 42/12 52/12 52/17 52/20 53/11 54/25 56/15 57/23 58/18 59/24 60/7 60/9 61/10 61/10 61/16 61/21 66/14 66/17 66/21 68/24 73/7 73/8 74/1 74/3 77/1 77/10 77/12 77/15 78/6 84/16 85/22 89/20 90/1 90/6 90/10 95/12 96/5 97/22 98/1 98/10 98/11 98/23 98/23 99/24 107/9 108/2 108/3 115/17 120/12 120/12 120/18 120/19 120/23 122/3 128/11 129/14 129/24 132/17</p>
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<p>B</p> <p>BOEING... [3] 132/20 134/20 135/25</p> <p>Boeing's [16] 9/8 12/7 12/18 12/23 13/4 13/20 14/10 14/16 15/18 16/21 17/13 31/21 31/21 120/16 130/3 134/7</p> <p>bond [1] 122/10</p> <p>both [15] 13/20 14/15 38/16 64/4 70/5 76/15 86/4 93/10 105/13 115/4 115/5 116/2 117/19 117/20 129/19</p> <p>bother [1] 55/20</p> <p>bound [2] 11/6 100/24</p> <p>boy [1] 98/22</p> <p>BP [6] 47/17 47/18 64/7 64/8 72/20 110/1</p> <p>Brad [1] 36/1</p> <p>Brady [1] 22/24</p> <p>BRAMMEIER [2] 2/13 3/16</p> <p>Branch's [1] 42/10</p> <p>BRANDON [2] 2/16 4/20</p> <p>break [2] 24/6 127/6</p> <p>breaks [1] 86/15</p> <p>brief [23] 6/12 8/2 17/18 20/20 23/7 23/16 25/18 29/15 30/19 30/25 38/2 39/2 57/9 59/1 62/11 63/19 80/20 101/14 107/24 108/2 119/11 121/2 122/16</p> <p>briefed [1] 122/4</p> <p>briefing [11] 7/18 37/13 102/10 107/11 107/11 115/16 119/14 120/7 125/16 125/18 126/17</p> <p>briefings [1] 78/2</p> <p>briefly [1] 122/10</p> <p>briefs [14] 8/23 22/9 26/17 27/12 29/11 37/14 37/14 37/14 37/15 38/15</p>	<p>92/23 93/1 107/24 135/1</p> <p>bring [14] 42/5 59/23 60/17 64/14 70/21 80/4 80/17 80/17 97/4 97/7 114/4 116/20 130/15 131/1</p> <p>bringing [2] 96/4 98/13</p> <p>British [2] 47/25 48/1</p> <p>broad [6] 7/8 11/20 11/21 15/1 69/1 69/6</p> <p>broadly [1] 113/17</p> <p>broken [1] 86/2</p> <p>brought [3] 58/10 97/14 113/22</p> <p>burden [1] 105/23</p> <p>burdensome [1] 45/20</p> <p>BURNS [2] 2/7 3/9</p> <p>Business [1] 138/20</p> <p>but [178]</p> <p>but-for [15] 63/15 63/20 63/22 86/3 91/6 93/25 96/1 116/16 116/18 116/21 116/23 116/23 116/24 117/2 131/12</p> <hr/> <p>C</p> <p>cabined [2] 62/3 94/10</p> <p>calculation [1] 69/11</p> <p>California [1] 4/5</p> <p>call [6] 20/17 29/3 30/1 54/19 92/12 119/16</p> <p>called [5] 9/10 9/11 9/18 65/10 104/21</p> <p>came [7] 38/18 61/24 65/19 82/5 98/15 125/17 125/24</p> <p>can [60] 7/14 10/7 12/2 15/1 15/6 18/16 19/3 19/6 20/7 21/15 22/5 22/19 23/10 26/19 28/16 29/7 29/8 29/11 29/11 32/12 33/6 34/10 34/25 39/8 39/11 39/12 39/21 41/1 44/23 47/7 47/12 50/12</p>	<p>51/4 53/5 53/18 56/7 58/3</p> <p>58/8 62/21 77/23 83/22</p> <p>84/8 85/23 89/6 93/19</p> <p>93/20 96/21 99/10 111/12</p> <p>114/2 114/14 121/7 124/5</p> <p>125/6 128/21 129/4 129/4</p> <p>129/19 130/5 136/20</p> <p>can't [20] 16/5 26/9 28/2 30/19 31/20 36/14 37/2 37/20 50/17 97/17 97/20 99/7 113/4 116/15 120/19 120/23 126/8 135/11 135/23 136/1</p> <p>Canada [1] 4/8</p> <p>Canal [1] 2/17</p> <p>candidly [2] 99/4 102/3</p> <p>candor [2] 23/15 23/17</p> <p>cannot [4] 8/25 13/19 28/10 57/25</p> <p>canon [1] 27/6</p> <p>car [1] 87/9</p> <p>care [2] 41/18 70/22</p> <p>careful [3] 20/20 53/20 78/17</p> <p>carefully [7] 25/20 26/12 26/14 27/20 59/22 79/12 98/6</p> <p>carried [1] 118/16</p> <p>carriers [2] 130/24 130/24</p> <p>case [181]</p> <p>cases [30] 8/2 17/1 27/18 28/14 35/22 37/9 42/12 42/17 53/25 59/14 75/9 77/21 78/9 86/19 102/1 102/8 107/12 109/11 112/13 112/16 112/16 115/2 115/6 116/17 116/18 117/3 117/7 121/6 121/18 126/9</p> <p>CASSELL [21] 2/3 3/11 5/1 37/19 98/7 105/9 107/22 109/20 112/21 114/11 119/4 119/8 119/20 121/2 121/14</p>
---	--	---

<p>C CASSELL... [6] 121/20 122/1 122/25 124/18 126/9 126/19 Cassell's [2] 112/12 122/12 catastrophic [2] 132/18 132/21 categories [1] 73/16 Catherine [1] 4/1 causal [17] 63/8 63/10 64/5 64/14 65/16 65/17 68/2 85/14 86/16 88/1 88/1 90/23 94/5 94/13 95/23 106/20 106/21 causation [15] 63/16 63/22 63/23 64/15 64/23 86/4 91/6 91/7 93/17 93/24 93/25 94/4 96/1 116/25 131/12 cause [19] 62/6 63/12 63/15 64/1 64/2 64/4 64/9 64/11 89/9 89/10 89/10 89/12 89/13 95/25 116/16 116/23 131/11 131/13 131/16 caused [1] 67/10 causes [6] 63/20 89/15 131/6 131/10 131/14 132/18 cautioned [1] 53/24 central [1] 5/11 certain [9] 32/13 35/4 74/25 76/14 77/5 77/21 99/19 114/18 120/4 certainly [18] 74/12 75/11 75/23 77/18 95/24 98/9 98/10 102/3 102/24 116/17 119/17 121/6 121/16 121/25 122/23 123/4 124/13 132/9 CERTIFICATE [1] 138/2 certify [2] 138/4 138/12 CHAD [2] 1/19 4/13 chain [2] 86/16 130/22 chance [6] 20/5 46/24</p>	<p>46/24 47/5 59/6 59/7 change [4] 45/22 48/25 123/18 134/25 changed [2] 59/5 117/25 changes [3] 77/5 102/11 120/16 chapter [1] 109/21 CHAREST [2] 2/7 3/9 charge [23] 28/6 38/7 58/8 58/16 58/19 58/20 59/20 61/5 61/5 70/21 72/14 72/19 73/14 75/25 76/3 79/19 80/12 99/25 99/25 100/1 107/2 111/25 112/1 charged [32] 38/23 57/2 57/3 57/11 57/12 57/18 58/5 60/7 60/11 60/17 61/8 62/9 62/13 64/5 65/3 67/19 68/7 69/17 70/6 70/22 73/5 79/18 87/1 88/12 88/13 92/19 94/21 94/22 106/22 121/9 121/10 121/12 charges [13] 11/4 27/25 28/2 28/5 33/2 38/5 59/23 80/9 97/14 111/25 114/4 127/24 128/21 charging [5] 17/2 17/5 60/9 70/18 75/19 chase [1] 63/25 chat [2] 89/21 89/21 checklist [1] 51/18 Cheever [1] 28/15 Cherry [1] 1/21 Chicago [2] 2/14 3/17 chicken [1] 81/7 chief [1] 60/12 children [1] 4/8 choose [1] 72/6 Chris [2] 4/4 4/4 chronology [1] 35/5</p>	<p>circuit [93] 7/11 7/12 7/13 8/3 11/2 11/3 11/5 16/18 16/23 17/1 17/7 27/21 28/1 28/8 28/9 28/11 28/12 28/13 28/14 28/15 28/19 33/4 33/5 33/8 35/9 36/25 37/2 37/22 38/12 38/13 38/16 38/20 38/21 39/1 39/1 39/5 39/6 39/8 42/6 42/19 42/23 45/9 45/10 46/8 46/20 48/9 48/9 49/9 50/19 50/20 50/21 62/15 63/10 63/17 72/15 79/5 79/10 81/20 84/23 86/20 88/4 88/16 89/11 91/20 91/24 92/4 92/5 93/1 93/4 93/8 93/9 103/16 109/15 109/23 110/13 110/20 111/4 112/8 113/10 116/7 116/8 116/13 117/5 121/7 122/8 123/1 123/11 128/18 128/19 128/24 129/1 129/7 129/8 Circuit's [3] 65/7 74/10 74/11 circumstance [1] 135/22 circumstances [7] 32/13 43/13 57/20 69/10 74/13 74/14 74/25 circumvented [1] 34/18 citation [1] 91/20 cite [5] 9/3 16/17 27/13 27/21 32/1 cited [22] 7/7 7/11 8/1 11/1 16/24 22/22 26/17 28/14 29/2 31/7 31/15 39/2 42/13 42/24 52/25 62/14 67/9 77/15 90/18 91/16 112/21 131/11 cites [3] 37/8 50/16 50/16 citing [1] 37/9 City [2] 2/5 47/15</p>
---	--	---

<p>C</p> <p>civil [7] 38/9 38/9 57/15 63/6 64/11 83/24 128/23 claim [3] 68/19 83/22 115/16 claimed [2] 87/6 92/16 claims [2] 90/4 90/20 clean [2] 50/22 50/23 cleaned [2] 25/24 25/25 clear [15] 7/1 11/12 14/22 15/11 17/16 20/9 42/23 55/23 87/24 105/19 121/16 127/25 133/8 133/15 133/19 clearly [13] 10/15 11/3 11/11 11/24 26/15 31/4 52/8 107/10 131/10 131/16 132/19 132/22 136/13 clients [3] 3/22 22/25 52/9 CLIFFORD [2] 2/13 3/16 close [8] 85/13 86/25 87/14 87/15 87/16 98/3 107/4 135/17 closely [2] 24/8 24/9 cloth [1] 73/21 co [1] 37/24 co-conspirator [1] 37/24 cocaine [1] 94/7 cognizant [1] 51/25 cold [1] 15/19 colleague [3] 4/21 35/25 84/16 colleague's [1] 91/20 collected [5] 17/1 60/1 62/20 68/4 83/19 collects [1] 29/6 COLLEGE [1] 2/3 Colombia [2] 92/11 94/6 combine [1] 91/3 combined [1] 60/23 come [30] 30/20 34/11</p>	<p>41/3 41/14 42/25 46/24 50/9 61/20 69/4 75/21 79/9 79/22 86/17 87/17 94/3 95/15 95/20 97/14 98/22 105/25 107/3 112/18 119/3 120/4 123/21 124/24 128/22 131/15 135/11 136/8 comes [4] 30/7 38/3 98/9 98/21 coming [6] 49/23 51/12 61/12 83/10 122/11 136/17 commendable [1] 101/8 comment [1] 71/16 commentators [1] 52/25 comments [1] 107/21 commercial [1] 26/7 commission [5] 63/3 63/14 86/25 87/11 87/15 commit [3] 32/23 33/19 33/21 committed [5] 22/25 37/17 59/13 104/15 104/17 committee [1] 32/16 common [2] 21/25 112/11 commonly [1] 122/15 communicated [1] 14/9 communication [1] 71/6 communications [2] 66/21 104/25 company [5] 1/9 2/15 77/6 99/18 107/9 competitive [1] 87/19 competitor [2] 87/18 87/22 complaint [1] 88/10 complaints [1] 104/3 completely [1] 55/22 complex [1] 117/19 compliance [2] 120/17 126/21 complicated [2] 21/8 84/3 complied [1] 126/14</p>	<p>comply [1] 138/13 complying [1] 115/17 component [1] 90/16 concealed [3] 51/22 88/11 88/12 concealing [3] 88/15 133/7 136/3 concealment [3] 116/15 117/17 117/22 concede [3] 25/7 93/16 100/4 conceded [2] 16/14 121/24 concept [3] 70/16 92/10 94/3 concepts [2] 83/25 117/8 concern [1] 74/20 concerned [2] 15/14 74/18 concerning [2] 8/18 69/7 concerted [1] 80/3 concession [1] 79/2 concessions [1] 77/11 conclude [8] 12/1 13/3 15/3 20/24 21/19 89/3 101/1 127/18 concluded [3] 101/3 116/3 137/1 conclusion [10] 7/22 16/2 16/3 22/23 24/19 54/14 55/17 73/3 97/4 98/22 condition [2] 33/18 76/20 conditions [12] 30/1 32/22 32/25 33/24 34/10 34/12 76/7 76/14 76/17 76/19 76/24 76/25 condolences [1] 108/5 conduct [24] 30/16 58/2 62/1 66/2 66/15 66/19 68/25 69/19 73/2 90/17 90/17 90/22 92/16 97/10 97/11 97/15 98/16 99/20 106/22 107/1 116/16 116/20 122/23 123/20</p>
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<p>C</p> <p>conducted [4] 30/12 30/16 31/25 32/10</p> <p>confer [30] 6/3 6/15 6/15 9/13 18/2 18/7 19/1 19/6 19/18 19/24 36/2 36/5 36/8 37/8 37/9 41/17 49/19 50/7 50/8 50/13 54/9 55/11 55/17 56/10 100/25 129/5 134/5 134/6 134/14 134/19</p> <p>Conference [1] 138/14</p> <p>conferral [9] 20/3 36/24 40/1 49/3 49/5 127/25 133/20 134/1 134/3</p> <p>conferred [2] 6/10 39/24</p> <p>conferring [4] 6/12 47/21 56/13 59/2</p> <p>confident [6] 46/21 48/16 52/9 123/13 123/16 125/2</p> <p>confirm [1] 11/22</p> <p>confirmed [1] 24/18</p> <p>confirming [2] 95/8 95/10</p> <p>conflate [1] 90/10</p> <p>conflating [1] 131/7</p> <p>conformity [1] 116/20</p> <p>confused [1] 9/18</p> <p>Congress [13] 7/7 10/20 11/6 18/15 18/16 20/12 32/8 48/11 55/12 56/3 104/7 104/7 134/13</p> <p>congressional [2] 90/18 90/19</p> <p>congressionally [1] 135/8</p> <p>connect [1] 19/22</p> <p>connected [1] 117/23</p> <p>connection [7] 16/20 63/10 64/5 85/4 93/5 106/4 131/25</p> <p>connects [1] 5/15</p> <p>connived [1] 32/24</p> <p>consequences [1] 132/18</p>	<p>consider [14] 63/9 80/9 81/21 84/14 91/9 91/13 91/13 91/25 92/17 92/18 93/2 101/25 104/6 127/5</p> <p>consideration [2] 86/3 105/3</p> <p>considerations [1] 69/13</p> <p>considered [7] 62/7 64/22 69/13 93/14 106/25 111/8 123/22</p> <p>considering [1] 125/9</p> <p>consistent [2] 49/16 123/25</p> <p>conspiracy [25] 12/7 14/16 15/18 16/21 17/14 57/4 59/21 60/4 60/7 60/11 66/11 66/14 66/18 69/8 88/11 88/11 88/13 88/15 88/19 90/5 92/7 93/6 94/25 116/16 130/3</p> <p>conspirator [1] 37/24</p> <p>conspirators [10] 60/3 60/6 61/9 66/4 66/15 66/16 67/6 90/9 90/11 91/2</p> <p>conspired [1] 14/2</p> <p>constrained [1] 58/1</p> <p>constructed [1] 83/8</p> <p>constructing [1] 78/17</p> <p>construction [7] 27/5 27/6 67/22 71/5 78/9 95/24 105/10</p> <p>consult [1] 25/16</p> <p>consultation [11] 59/6 74/6 80/1 81/2 109/25 110/2 110/6 110/8 111/6 111/11 112/9</p> <p>consultations [1] 59/5</p> <p>consulted [2] 25/7 74/5</p> <p>consuming [1] 21/8</p> <p>consummated [2] 81/2 84/13</p>	<p>contained [1] 117/13</p> <p>contemplated [2] 112/21 112/22</p> <p>contend [1] 75/4</p> <p>content [1] 118/11</p> <p>contention [1] 76/18</p> <p>contents [1] 99/15</p> <p>contested [1] 55/3</p> <p>context [5] 52/1 62/19 77/16 92/10 92/19</p> <p>contexts [1] 76/11</p> <p>continues [2] 10/5 73/7</p> <p>contours [1] 101/21</p> <p>contract [7] 87/23 87/25 88/3 119/25 120/1 120/1 120/6</p> <p>contractor [2] 87/19 87/20</p> <p>contractual [1] 75/11</p> <p>contractually [2] 40/17 74/3</p> <p>contradict [1] 77/13</p> <p>contradicting [1] 39/3</p> <p>contrary [6] 28/20 29/14 55/9 55/14 82/8 90/19</p> <p>contrast [1] 111/24</p> <p>control [4] 12/21 67/3 90/21 118/18</p> <p>controlling [3] 28/18 39/6 44/24</p> <p>convenient [1] 55/19</p> <p>conversation [1] 95/10</p> <p>conveyed [1] 71/3</p> <p>convict [1] 98/23</p> <p>conviction [2] 62/24 73/15</p> <p>convince [3] 20/14 50/14 56/14</p> <p>convincingly [1] 15/17</p> <p>cooperating [2] 9/5 9/9</p> <p>cooperation [1] 77/23</p> <p>cooperator [2] 77/21 77/23</p>
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<p>C</p> <p>Case 4:21-cr-00005-O Document 95 Filed 05/12/22 Page 150 of 189 PageID 1254</p> <p>core [2] 107/14 121/1</p> <p>corporate [2] 69/9 69/18</p> <p>corporation [1] 73/1</p> <p>correct [2] 31/14 138/5</p> <p>correctly [1] 135/2</p> <p>corrupt [2] 87/24 88/2</p> <p>could [62] 10/3 10/13 10/23 12/11 13/3 14/14 14/19 15/2 15/13 15/14 19/7 21/8 23/24 25/10 30/14 34/13 39/23 40/7 40/19 41/10 42/24 48/18 49/11 54/18 55/16 59/23 59/24 62/2 63/5 63/20 65/3 72/6 77/18 79/17 79/18 80/17 81/24 82/15 82/19 94/14 96/7 97/4 97/7 97/14 98/10 98/23 102/14 102/17 102/24 105/16 108/23 112/20 113/5 120/18 121/4 124/10 124/20 127/18 130/3 130/18 132/18 133/6</p> <p>couldn't [2] 17/20 76/23</p> <p>counsel [3] 83/7 107/16 125/20</p> <p>counsel's [1] 79/13</p> <p>Count [2] 109/3 113/24</p> <p>Count I [2] 109/3 113/24</p> <p>country [5] 8/4 14/5 34/5 53/1 119/20</p> <p>counts [2] 11/22 61/4</p> <p>couple [10] 54/7 68/15 69/21 75/9 92/2 98/24 106/11 107/21 116/12 117/11</p> <p>course [19] 7/24 28/3 29/7 39/4 57/5 68/3 69/5 82/15 87/9 87/11 101/19 102/14 103/8 110/21 111/14 111/20 118/17 131/25 135/21</p>	<p>court [198]</p> <p>court's [26] 3/20 6/18 8/17 13/25 21/2 21/3 24/3 29/22 38/9 74/21 77/25 79/24 84/24 90/12 90/13 101/19 101/22 107/13 107/17 110/12 112/2 112/3 112/19 114/20 115/25 123/7</p> <p>courthouse [1] 33/1</p> <p>courts [8] 8/4 11/6 17/2 32/9 78/16 82/2 100/24 122/17</p> <p>cover [3] 24/22 128/9 130/22</p> <p>covered [6] 11/17 24/24 25/4 25/4 35/17 41/1</p> <p>COVID [1] 138/8</p> <p>COVID-19 [1] 138/8</p> <p>coy [1] 8/23</p> <p>cr [2] 1/6 128/22</p> <p>crafted [1] 11/14</p> <p>crafting [1] 128/4</p> <p>crash [32] 8/9 8/13 8/13 8/15 11/23 15/7 20/25 56/22 59/2 65/21 65/22 65/23 67/8 67/9 67/14 68/1 68/5 71/1 71/11 71/18 73/25 74/5 77/9 85/11 85/15 86/4 89/14 108/1 120/15 127/15 131/11 133/11</p> <p>crashed [1] 87/10</p> <p>crashes [32] 4/3 4/9 6/22 7/4 8/19 8/21 9/1 9/2 9/6 9/13 9/20 9/25 10/11 17/17 57/15 57/17 57/21 57/25 60/20 65/22 68/7 77/10 85/2 85/15 88/25 94/20 106/21 131/10 131/19 131/23 131/25 132/6</p> <p>create [5] 7/8 17/9 68/6 68/6 80/7</p>	<p>created [8] 13/4 13/21 13/23 23/3 113/14 129/14 130/6 132/14</p> <p>creating [5] 13/5 19/4 64/25 128/19 130/7</p> <p>creation [1] 66/24</p> <p>credible [1] 61/21</p> <p>credit [1] 40/18</p> <p>crew [15] 12/8 12/17 12/20 12/24 12/25 13/1 13/4 13/9 13/16 13/21 14/17 14/20 67/11 91/5 130/1</p> <p>crime [107] 5/12 5/20 5/22 5/24 6/8 6/15 6/24 7/4 7/5 7/6 7/9 7/14 7/15 7/15 8/9 8/14 8/16 9/11 10/15 10/17 11/11 13/4 13/5 13/21 14/16 14/22 15/7 17/5 17/8 17/10 17/21 17/25 18/4 18/18 19/23 20/25 22/3 22/11 22/17 24/2 35/3 35/12 53/15 55/18 56/25 57/1 57/3 57/10 57/11 58/5 58/20 59/19 62/7 62/13 67/19 68/7 69/17 70/6 70/6 70/13 70/14 71/18 72/2 72/4 73/5 73/17 74/2 80/3 80/24 81/11 81/15 82/3 82/6 82/20 82/25 87/1 87/14 88/12 88/13 89/4 92/16 92/19 93/3 94/21 94/22 99/1 99/3 100/8 100/10 100/11 101/18 102/16 104/18 106/25 109/9 113/22 116/22 121/8 121/9 121/10 121/12 123/19 127/13 128/7 128/13 130/8 133/12</p> <p>crimes [15] 11/16 11/23 11/25 24/14 24/24 25/4</p>
---	--	---

<p>C crimes... [9] 32/23 33/19 33/21 56/16 65/3 69/2 69/6 79/18 80/17 criminal [49] 5/23 7/22 9/9 10/7 10/10 13/24 14/1 30/9 30/11 33/2 34/5 34/17 38/19 57/18 58/2 58/11 58/16 58/19 60/4 60/6 60/15 62/1 62/9 62/18 62/19 62/21 64/10 64/18 65/24 66/1 66/16 69/8 69/19 80/4 89/16 97/15 97/20 97/21 97/21 99/20 99/22 107/2 109/3 111/20 113/24 117/16 117/23 128/4 128/23 criminally [3] 56/15 98/2 130/8 critically [1] 10/14 Cruz [8] 10/21 20/18 25/18 25/21 26/5 40/5 45/21 135/15 Cruz's [1] 29/15 curious [1] 23/6 customers [1] 74/1 cut [3] 10/9 35/24 45/1 CVRA [102] 5/12 6/9 7/5 8/2 8/10 10/22 11/3 15/8 17/22 18/4 18/7 18/10 18/11 18/13 18/15 18/17 18/19 18/21 18/24 18/25 20/19 20/25 22/1 22/3 22/4 22/14 22/18 22/20 37/5 37/12 38/4 38/8 45/14 45/22 50/5 50/23 54/8 55/7 55/10 55/14 55/17 55/23 56/11 57/1 58/21 58/23 59/18 59/19 60/15 65/4 69/23 71/18 72/4 74/2 74/7 78/11 78/13 78/21 79/14 80/14</p>	<p>80/15 81/1 82/8 83/3 83/13 102/16 103/2 103/4 103/7 103/14 103/20 103/25 104/1 104/2 104/4 104/12 104/18 105/17 106/19 107/1 108/10 108/11 108/14 108/14 108/21 108/25 110/25 111/21 113/14 113/20 113/24 119/22 119/24 121/4 121/15 121/22 124/18 126/6 127/13 130/7 133/12 134/22 CVRA's [1] 100/24</p> <hr/> <p>D D.C [16] 2/21 27/21 28/1 28/8 28/9 28/12 72/15 74/11 91/20 91/24 92/4 92/5 93/1 93/4 93/8 93/9 Dallas [1] 2/8 damaged [1] 87/10 dark [1] 45/2 DARREN [2] 2/7 3/8 daughter [1] 4/3 David [1] 4/4 day [9] 36/13 36/17 36/18 54/22 55/5 110/7 123/24 125/8 138/15 days [4] 31/3 54/20 55/2 58/15 de [2] 91/20 93/24 dead [1] 37/19 deal [8] 10/10 13/17 19/14 45/2 49/6 50/10 126/20 127/1 dealt [1] 127/14 Dean [48] 11/1 11/2 37/8 38/19 38/22 39/3 43/7 43/8 46/19 47/15 49/15 49/16 49/21 50/16 70/2 70/2 70/3 70/5 72/20 79/23 79/23 80/1 81/6</p>	<p>81/6 81/8 82/10 100/23 109/14 109/15 109/18 109/19 109/23 111/12 111/17 112/5 112/6 121/9 121/11 123/10 124/14 124/23 125/11 125/15 125/23 128/20 128/25 129/1 129/8 Dean's [1] 124/1 death [1] 12/21 deaths [5] 16/21 96/6 132/3 134/8 135/10 decades [2] 29/1 29/14 deceived [1] 6/21 decency [2] 10/12 21/24 deception [1] 71/5 decide [6] 17/21 28/2 43/12 82/18 111/19 124/10 decided [4] 56/24 92/3 123/11 132/5 decides [2] 56/8 114/20 deciding [1] 110/19 decision [32] 11/6 34/14 34/15 35/10 38/17 45/19 46/19 49/23 54/4 65/2 65/7 65/7 70/18 74/10 74/11 74/21 78/10 78/19 81/23 82/7 86/21 90/15 91/9 101/14 101/15 109/22 110/4 113/6 122/8 124/24 134/6 134/14 decision-making [1] 34/14 decisions [10] 42/10 114/9 114/12 114/17 116/13 116/14 118/13 118/15 118/18 134/14 declaration [1] 72/22 dedicate [1] 123/13 deepest [1] 108/5 defeating [1] 14/3 defendant [21] 1/10 19/14 26/20 26/24 30/9 31/18</p>
--	--	--

<p>D defendant... [15] 32/5 32/12 32/18 33/6 33/11 35/24 45/1 56/5 62/25 70/4 80/2 87/25 88/7 93/21 128/4 defendant's [2] 7/23 17/10 defendants [4] 11/17 24/24 30/3 32/25 Defense [1] 53/8 defer [2] 111/24 115/12 deferral [1] 126/10 deferred [11] 6/5 10/18 10/23 10/24 11/15 52/2 62/4 72/13 72/17 112/2 134/18 defined [3] 57/19 58/16 93/17 definition [9] 7/8 31/12 57/1 59/19 73/17 104/19 108/21 117/10 124/21 defraud [3] 14/2 57/4 59/21 degree [3] 102/4 105/2 106/23 delay [3] 31/9 31/12 78/3 delayed [3] 70/8 77/22 81/10 demonstrate [2] 12/10 15/17 denied [4] 58/24 111/7 113/9 115/6 denies [1] 43/8 deny [4] 38/25 43/14 48/15 80/21 denying [2] 109/19 110/13 department [22] 8/20 9/10 9/22 10/3 10/18 22/16 22/19 51/21 59/13 67/24 71/2 71/7 71/8 71/14 96/3 99/24 104/11 105/3 120/17</p>	<p>120/20 122/3 127/20 Department's [2] 9/5 103/1 depend [5] 81/5 97/2 97/3 98/14 98/15 deprived [3] 34/1 34/18 35/3 described [11] 18/19 22/18 56/4 60/3 60/13 60/19 60/19 62/11 62/15 62/23 85/14 describing [1] 61/17 deserve [1] 23/8 deserves [1] 53/20 design [8] 57/21 57/24 66/24 66/25 90/24 90/25 91/1 99/13 designating [2] 104/8 104/9 designed [3] 55/15 80/15 80/16 designees [2] 58/6 108/15 despite [1] 78/1 detailed [1] 43/24 details [2] 95/11 133/23 determination [14] 7/16 17/6 17/24 29/20 62/17 62/23 66/9 69/14 79/24 80/11 80/16 93/16 105/14 118/1 determinations [2] 58/6 62/10 determine [13] 17/3 35/2 63/1 75/3 80/24 81/14 82/3 82/19 84/18 102/16 114/2 123/18 128/2 determined [9] 37/11 65/12 70/10 81/5 81/14 82/6 111/1 118/6 124/7 determines [1] 126/4 determining [1] 59/15 detriment [1] 120/5</p>	<p>devoted [1] 119/13 dicia [2] 110/4 111/5 dictate [1] 108/13 did [77] 6/16 13/16 18/3 18/22 19/14 27/12 36/8 36/8 36/9 41/15 46/23 46/24 47/3 47/10 57/16 57/17 59/3 59/10 60/16 60/18 61/20 65/11 66/10 68/9 69/3 69/17 72/9 75/24 78/3 82/3 82/12 82/13 82/13 82/22 83/18 84/16 84/17 87/22 88/16 88/17 90/20 90/21 91/4 91/19 92/15 93/7 94/25 95/3 95/16 96/9 97/13 97/15 97/21 99/14 99/14 103/18 107/25 108/2 109/20 110/1 110/5 110/7 112/8 112/13 112/17 113/11 115/4 118/9 121/21 125/23 125/25 129/14 129/22 131/5 132/12 134/7 134/23 didn't [35] 11/8 11/19 13/2 19/24 23/16 24/18 27/13 30/5 35/21 44/7 44/10 44/10 49/9 49/12 51/6 55/11 55/13 81/21 81/21 88/9 92/22 95/1 95/2 96/12 96/13 98/2 98/3 98/6 98/19 98/20 98/20 99/21 124/15 130/4 131/18 died [1] 17/16 difference [7] 19/8 33/15 47/7 51/3 79/24 126/1 129/11 differences [1] 118/3 different [31] 8/10 27/25 28/7 28/13 29/1 29/12 39/19 46/11 61/5 64/13 68/5 70/3 72/14 72/16 75/9 75/25 75/25 76/1</p>
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<p>D</p> <p>different... [13] 85/21 85/23 92/6 92/10 94/13 95/23 102/17 111/14 116/10 118/5 126/2 129/3 131/14</p> <p>differently [2] 71/4 71/12</p> <p>difficult [3] 46/6 82/1 96/15</p> <p>direct [13] 16/20 49/9 63/10 63/11 64/15 64/23 88/8 89/9 93/16 107/18 109/7 132/11 135/3</p> <p>directed [3] 22/15 49/17 93/1</p> <p>directly [12] 7/5 23/11 30/21 57/12 62/8 63/2 63/14 64/2 64/3 86/24 89/12 132/6</p> <p>directness [1] 64/5</p> <p>directs [2] 37/13 54/8</p> <p>disagree [5] 21/14 65/9 77/18 78/8 134/11</p> <p>disagreeing [3] 20/10 27/24 38/21</p> <p>disapprove [1] 75/16</p> <p>discharge [1] 23/17</p> <p>disclose [3] 133/1 133/2 133/5</p> <p>disclosed [5] 25/15 57/22 95/2 95/6 99/14</p> <p>disclosing [1] 61/17</p> <p>disclosure [5] 5/15 21/6 21/10 26/8 79/7</p> <p>disclosures [5] 66/3 89/25 90/2 90/3 99/16</p> <p>discover [1] 98/20</p> <p>discovery [18] 16/15 22/7 37/4 63/6 64/12 78/7 78/11 78/12 78/12 78/23 79/1 79/5 79/6 108/18 121/15 121/17 121/19 121/22</p>	<p>discrete [1] 56/24</p> <p>discretion [10] 20/9 28/6 65/4 70/20 72/6 75/19 79/22 108/16 113/19 126/23</p> <p>discuss [4] 18/6 28/4 29/11 57/7</p> <p>discussed [1] 94/11</p> <p>discusses [1] 49/24</p> <p>discussing [3] 24/22 33/5 115/5</p> <p>discussion [4] 47/7 81/18 132/12 133/21</p> <p>dishonest [1] 14/3</p> <p>dismay [1] 10/8</p> <p>dismiss [4] 36/14 76/13 126/20 126/22</p> <p>dismissal [4] 73/5 126/15 126/17 126/18</p> <p>dispositive [1] 108/12</p> <p>dispute [10] 6/7 6/16 6/20 12/2 13/14 27/14 121/15 121/16 121/25 132/8</p> <p>disputed [7] 9/1 13/20 15/10 15/11 17/8 24/2 121/12</p> <p>disputes [4] 8/3 12/11 23/20 25/2</p> <p>disputing [2] 20/10 130/19</p> <p>distance [1] 3/22</p> <p>distributing [1] 94/7</p> <p>district [42] 1/1 1/2 1/14 1/21 8/2 19/11 27/23 35/1 35/7 46/21 50/24 53/24 56/5 56/7 70/12 74/21 74/23 75/16 78/16 80/10 91/25 92/17 93/2 100/23 112/16 112/23 113/7 113/15 114/8 114/12 115/6 117/4 121/21 121/21 122/6 123/12 123/13 123/16 125/2 125/22 129/2 138/18</p>	<p>dive [2] 8/10 127/8</p> <p>diversion [1] 58/7</p> <p>diverted [1] 116/9</p> <p>division [9] 1/3 42/6 42/7 42/14 52/6 52/6 52/7 56/6 138/19</p> <p>do [108] 8/8 11/12 11/19 12/12 12/22 12/25 13/22 16/23 17/13 18/17 19/1 19/22 20/7 20/9 22/5 24/10 24/14 24/17 26/13 28/25 30/7 31/3 36/15 37/20 39/11 40/24 41/5 41/10 42/18 45/2 47/2 47/9 47/10 47/21 48/8 50/15 51/14 53/13 53/18 54/11 56/14 57/20 58/20 59/4 66/18 67/25 68/1 68/10 72/2 72/2 72/3 73/6 73/12 74/4 76/16 76/16 80/15 81/14 82/1 82/2 83/24 84/8 84/12 84/21 89/15 91/23 92/5 93/7 94/17 96/19 101/4 102/3 102/7 102/24 103/17 105/4 105/8 105/9 105/24 107/13 107/17 107/23 113/21 119/9 121/16 121/25 122/12 122/17 123/8 123/16 123/17 123/25 124/3 126/9 126/19 126/25 128/1 128/2 128/16 129/2 133/9 133/17 134/21 135/2 135/4 135/6 135/25 136/18</p> <p>docket [12] 6/18 13/25 14/7 16/1 25/13 28/22 29/18 38/7 72/10 110/12 112/2 114/20</p> <p>docketing [1] 38/9</p> <p>document [3] 17/3 17/5 29/18</p> <p>documentary [1] 97/19</p>
--	---	--

<p>D documents [6] 8/25 21/16 37/2 92/1 98/6 132/20 Doe [1] 78/9 Doe's [1] 121/20 does [33] 11/12 17/15 24/9 24/22 30/18 31/18 32/17 33/20 48/11 53/25 55/8 57/14 68/18 73/15 77/16 78/11 81/13 83/13 83/14 83/24 88/6 91/6 93/24 95/16 104/2 105/24 109/11 111/15 114/15 114/19 122/20 126/9 128/9 doesn't [14] 14/23 18/8 25/5 28/19 31/1 31/3 40/21 55/2 76/22 89/8 89/8 94/1 94/2 118/18 doing [9] 8/24 18/22 27/24 72/24 73/22 83/16 103/18 104/15 136/3 DOJ [2] 67/23 98/5 domain [1] 42/9 dominoes [1] 6/25 don't [70] 4/7 6/7 12/1 16/2 17/20 21/1 22/5 23/4 24/17 28/25 32/2 32/22 32/23 32/23 36/4 38/4 38/23 39/12 40/9 40/10 42/12 43/11 43/14 48/17 51/15 51/17 51/18 52/1 52/1 53/2 55/19 64/16 68/8 68/10 71/16 72/7 77/19 79/4 83/23 89/1 90/9 90/24 92/12 94/17 100/12 100/14 101/19 101/21 104/21 105/10 106/5 110/4 119/8 119/22 120/2 120/4 120/8 120/11 121/15 122/8 124/2 124/4 124/9 124/17 126/16 127/5 130/20 131/13 132/4</p>	<p>134/10 done [15] 26/4 26/10 30/17 35/25 46/11 49/6 50/10 53/16 56/9 68/3 82/2 84/18 101/9 119/20 125/22 doubt [11] 7/20 33/3 33/13 58/9 59/25 62/2 80/5 93/20 114/3 132/9 132/24 dovetails [2] 68/12 107/15 down [13] 12/19 13/11 19/11 30/3 30/14 37/3 79/9 81/13 89/2 110/22 111/8 124/11 133/1 DPA [106] 6/5 6/17 8/15 11/12 14/7 19/2 19/2 19/5 24/7 24/13 24/21 25/3 25/8 25/12 25/15 26/11 26/14 26/19 29/7 39/16 39/23 40/3 41/5 52/16 54/12 57/19 58/13 58/18 59/3 59/6 59/17 60/23 68/14 68/16 68/18 68/20 68/25 69/7 69/14 69/15 71/23 72/6 72/24 73/3 73/8 73/9 73/21 74/9 74/24 75/4 75/6 75/10 75/16 77/2 77/6 77/11 77/12 77/16 84/5 96/21 97/8 97/10 98/12 98/17 99/11 99/23 100/2 103/22 103/23 105/7 105/16 105/22 106/15 108/13 108/17 108/19 111/24 114/15 114/15 114/16 114/19 114/24 115/1 115/4 115/9 115/17 116/6 116/10 119/6 119/7 119/13 119/21 120/1 120/8 120/20 120/23 122/3 122/15 122/18 126/2 126/9 126/13 127/22</p>	<p>129/19 135/3 135/13 DPAs [2] 69/12 111/16 drafting [2] 20/19 127/21 drawn [1] 73/21 dressing [2] 47/6 50/10 driving [2] 12/19 13/11 dropped [1] 38/16 drug [2] 92/7 94/6 dual [1] 63/12 due [1] 138/8 DUFFY [10] 1/20 4/13 56/19 108/23 110/25 114/24 117/15 120/12 128/1 135/2 during [13] 8/13 11/7 56/1 58/14 60/1 60/10 68/3 69/5 85/10 87/15 94/9 94/11 127/19 duties [1] 23/15</p> <hr/> <p>E</p> <p>each [2] 64/2 89/13 earlier [5] 50/17 59/6 62/11 74/4 74/5 easy [1] 120/9 Edwards [1] 36/1 effectively [1] 53/9 effects [1] 7/15 efforts [3] 22/16 22/20 55/25 egg [1] 81/7 Egyptian [1] 100/1 either [3] 41/11 48/6 76/4 element [3] 43/12 43/12 116/24 elements [4] 43/9 43/10 43/11 76/1 Eleventh [16] 35/9 36/25 37/2 37/22 38/12 38/13 38/15 38/20 39/1 39/5 65/7 79/10 103/16 113/10 128/18 128/24 Eleventh Circuit [8] 35/9</p>
---	---	--

<p>E</p> <p>Eleventh Circuit... [7] 38/12 38/13 38/20 39/5 113/10 128/18 128/24</p> <p>Eleventh Circuit's [1] 65/7</p> <p>eliminate [1] 31/8</p> <p>eliminated [1] 131/22</p> <p>ELISSA [2] 2/16 4/24</p> <p>ELLIS [2] 2/20 4/18</p> <p>Elrod [1] 44/18</p> <p>else [7] 34/7 43/1 44/18 65/1 106/2 134/2 136/21</p> <p>embrace [1] 68/1</p> <p>embroil [1] 25/2</p> <p>Employee [6] 60/7 60/9 61/21 89/20 94/24 97/22</p> <p>employees [3] 14/10 66/17 90/1</p> <p>employment [1] 54/1</p> <p>en [7] 38/12 38/13 38/16 39/2 65/7 113/11 113/13</p> <p>enable [1] 20/3</p> <p>encompass [2] 57/20 60/18</p> <p>encounter [1] 134/7</p> <p>end [8] 5/13 20/10 36/16 36/18 110/7 123/23 126/20 134/11</p> <p>Energy [1] 16/18</p> <p>enforce [8] 11/7 22/20 54/10 56/1 56/9 100/24 101/2 101/20</p> <p>enforceable [2] 55/13 55/15</p> <p>enforcement [4] 18/20 56/3 79/15 80/8</p> <p>engage [6] 67/4 67/10 68/8 91/5 113/1 115/13</p> <p>engaged [4] 12/20 67/4 77/9 77/10</p> <p>engaging [1] 72/24</p> <p>engineered [1] 34/3</p> <p>engineering [1] 99/15</p>	<p>engineers [3] 57/23 61/16 95/11</p> <p>enhanced [1] 77/4</p> <p>enhancement [1] 63/22</p> <p>enough [4] 11/21 88/5 89/3 132/24</p> <p>ensure [7] 14/11 18/18 18/24 20/15 22/3 22/7 54/8</p> <p>ensuring [1] 22/11</p> <p>enter [1] 23/20</p> <p>entered [7] 110/1 110/9 110/11 111/2 111/9 112/1 120/3</p> <p>entering [3] 25/8 59/3 109/25</p> <p>entirely [4] 97/2 97/3 120/8 132/23</p> <p>entities [1] 73/16</p> <p>entitled [5] 16/7 16/12 32/5 46/3 138/6</p> <p>entity [1] 62/7</p> <p>entry [3] 16/1 38/7 72/10</p> <p>envision [1] 55/8</p> <p>envisioned [1] 123/23</p> <p>Epstein [10] 19/12 19/13 35/3 35/25 36/25 37/14 37/16 37/19 47/11 113/8</p> <p>Epstein's [1] 36/22</p> <p>equipment [1] 57/24</p> <p>era [1] 86/19</p> <p>ERIN [2] 2/10 3/13</p> <p>erroneous [1] 83/2</p> <p>error [1] 51/2</p> <p>especially [1] 119/23</p> <p>essence [1] 45/12</p> <p>essential [1] 6/1</p> <p>essentially [7] 5/24 27/15 50/24 52/24 79/2 92/17 121/23</p> <p>establish [4] 41/24 58/20 96/7 96/9</p>	<p>established [3] 60/2 66/1 67/6</p> <p>establishing [1] 64/15</p> <p>Ethiopian [4] 13/8 13/15 56/22 108/7</p> <p>evaluate [2] 110/18 116/5</p> <p>even [21] 11/3 12/24 27/13 31/19 48/11 51/17 58/8 59/3 59/5 65/2 67/21 89/5 105/23 106/18 106/18 111/3 113/1 114/6 121/20 130/16 135/21</p> <p>event [2] 35/6 131/15</p> <p>events [2] 60/18 117/20</p> <p>Eventually [1] 45/3</p> <p>ever [3] 56/23 119/20 119/21</p> <p>every [6] 25/23 30/9 109/13 112/13 116/1 130/22</p> <p>everybody [4] 55/19 90/5 90/10 131/20</p> <p>everyone [2] 33/10 34/6</p> <p>everything [3] 65/11 99/12 130/3</p> <p>evidence [64] 8/1 8/6 8/7 42/2 52/18 57/5 57/7 58/2 58/4 58/9 58/13 58/13 58/14 60/1 60/5 60/21 61/7 61/19 61/21 62/19 65/18 67/5 68/11 68/12 69/4 69/18 75/22 75/23 76/2 83/18 83/18 83/19 83/22 84/4 90/13 90/13 91/25 92/25 94/12 95/6 95/7 95/18 96/7 96/9 96/11 97/13 97/15 97/21 98/15 98/16 98/18 99/21 131/3 131/17 131/19 132/8 132/10 132/25 133/1 133/2 133/5 133/7 133/8 134/7</p> <p>evidentiary [11] 15/17</p>
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<p>E evidentiary... [10] 15/24 16/7 16/10 16/12 41/23 46/9 130/11 130/14 131/2 132/7 exactly [8] 8/24 13/12 55/7 83/22 85/20 91/16 118/16 135/13 examination [1] 39/21 examined [1] 24/9 examining [1] 24/7 example [12] 9/3 13/24 81/6 87/2 87/8 89/14 103/22 104/17 104/24 106/9 106/13 118/24 examples [3] 29/6 86/23 106/12 excellent [2] 29/2 35/18 excise [5] 119/7 119/10 119/15 119/17 120/4 excising [3] 103/23 119/13 119/23 exclude [3] 114/20 115/12 115/19 exclusion [1] 72/11 exclusions [1] 98/25 excuse [4] 70/14 72/3 94/23 103/6 execute [1] 26/19 executed [1] 70/23 executing [1] 135/21 Executive [1] 42/9 exercise [8] 18/6 20/2 20/4 36/23 58/7 74/17 75/2 75/18 Exhibit [1] 53/8 Exhibit 1 [1] 53/8 exist [1] 104/14 existed [2] 98/19 99/18 existing [1] 15/6 exists [2] 119/22 130/9 exoneration [1] 40/8</p>	<p>expand [3] 10/22 57/10 83/25 expanded [1] 80/20 expansion [7] 45/22 61/11 61/11 61/17 61/23 66/3 95/10 expansive [1] 7/9 expect [1] 25/13 expected [1] 126/14 expeditiously [1] 5/7 expert [4] 15/25 16/2 16/3 65/23 experts [1] 85/22 explain [8] 23/16 29/12 34/11 43/7 43/15 44/1 44/23 128/8 explained [8] 10/20 25/6 40/21 63/7 63/11 63/17 72/15 134/22 explaining [1] 25/18 explanation [6] 10/1 10/2 24/16 26/4 41/4 53/17 explosion [2] 47/15 72/21 express [1] 48/19 expressly [1] 108/14 extended [2] 45/16 112/3 extends [1] 108/5 extremely [3] 96/15 97/16 117/19 eyes [1] 98/21</p> <hr/> <p>F F.3d [4] 62/22 63/9 63/18 86/21 FAA [17] 12/8 14/4 14/10 17/14 57/5 57/23 61/18 66/2 66/6 66/7 89/25 90/6 90/17 90/20 95/3 118/18 130/23 face [1] 87/5 Facebook [1] 10/9 faced [1] 118/22 fact [35] 6/11 6/22 8/8</p>	<p>9/11 12/10 14/15 17/11 17/14 19/22 21/9 21/9 29/16 36/10 36/11 36/12 36/15 38/8 43/13 48/12 58/12 63/12 63/13 68/20 70/6 70/14 86/1 86/6 88/2 89/21 91/3 92/16 94/9 97/14 106/24 108/14 fact-finding [8] 17/11 19/22 21/9 21/9 36/10 36/11 36/12 36/15 factors [14] 60/20 64/14 64/22 65/16 65/17 68/2 68/5 85/14 90/23 94/5 94/14 95/23 106/20 106/21 facts [67] 13/14 14/20 15/10 15/11 15/20 15/23 16/15 16/19 17/3 17/12 19/23 22/6 36/8 36/14 40/25 43/18 52/16 57/19 57/20 58/17 58/18 58/19 60/4 60/14 62/3 62/24 63/1 67/25 68/2 68/14 69/1 69/10 72/8 80/6 85/9 85/10 86/4 86/5 86/15 88/6 88/23 89/5 89/17 91/10 91/13 93/17 93/19 93/21 95/7 95/16 97/3 97/8 97/9 97/11 98/11 99/11 100/18 101/15 117/12 117/14 117/16 124/23 129/18 130/6 130/16 130/21 130/22 factual [12] 12/2 12/11 21/12 23/12 23/20 27/22 62/16 67/18 67/18 77/11 92/19 93/9 factually [2] 78/22 117/8 failed [2] 37/7 136/14 failure [4] 6/14 6/15 25/16 67/2</p>
---	---	--

<p>F</p> <p>failures [2] 57/25 132/22</p> <p>fair [1] 23/10</p> <p>fairly [1] 87/24</p> <p>fairness [2] 6/7 23/9</p> <p>faith [3] 82/23 83/1 84/8</p> <p>faithfully [1] 70/23</p> <p>fall [1] 124/17</p> <p>false [2] 9/21 10/3</p> <p>familiar [2] 22/24 132/13</p> <p>families [42] 5/3 6/8 6/11 6/12 6/17 6/19 7/2 9/7 9/23 10/4 10/6 10/8 10/14 11/24 15/7 15/16 18/4 18/25 19/6 20/5 20/11 20/12 20/24 21/20 22/12 23/2 23/8 25/11 26/2 34/11 34/14 46/2 47/4 55/10 55/24 108/6 127/13 128/12 129/5 133/11 133/17 135/9</p> <p>family [7] 7/3 9/7 17/25 54/21 55/15 130/12 135/10</p> <p>famous [1] 46/10</p> <p>far [7] 12/2 53/13 73/8 90/25 100/17 106/8 131/4</p> <p>faults [1] 95/1</p> <p>faulty [1] 86/10</p> <p>favor [5] 6/24 12/12 16/5 29/21 37/7</p> <p>favorable [1] 52/10</p> <p>FBI [1] 9/18</p> <p>FCOM [1] 12/23</p> <p>FCRR [2] 138/4 138/17</p> <p>February [2] 37/10 71/2</p> <p>February 2020 [1] 71/2</p> <p>federal [22] 5/23 30/11 31/7 32/4 38/7 38/7 38/23 58/3 58/4 59/25 63/3 63/15 69/1 69/6 108/22 109/1 109/2 109/5 109/7 111/20 113/21 114/2</p>	<p>feel [1] 91/24</p> <p>feelings [1] 92/4</p> <p>fees [1] 138/12</p> <p>feet [1] 87/5</p> <p>Feinstein [1] 45/21</p> <p>felt [1] 115/11</p> <p>few [8] 14/7 34/21 71/24 80/23 86/23 94/14 94/14 121/1</p> <p>Fifth [49] 7/11 7/12 7/13 11/2 11/2 11/5 16/18 16/23 17/1 17/7 28/15 28/19 33/4 33/5 33/8 39/6 42/6 42/19 42/23 45/9 45/10 46/8 46/20 49/9 50/18 50/20 50/21 63/10 63/16 81/20 84/23 86/20 88/4 89/11 109/15 109/23 110/13 110/20 111/4 112/8 116/7 116/8 116/13 117/5 121/7 123/1 129/1 129/7 129/8</p> <p>figure [4] 32/21 36/8 46/21 84/9</p> <p>file [6] 28/6 37/5 37/14 48/1 52/5 56/7</p> <p>filed [36] 6/18 9/4 11/4 14/7 15/21 15/25 25/15 25/18 27/25 28/2 28/5 33/2 36/1 38/2 38/5 38/23 56/9 60/17 60/23 60/24 64/20 68/20 70/8 72/14 72/19 73/14 75/10 75/12 83/14 91/12 91/14 114/19 115/9 123/19 128/21 131/21</p> <p>files [5] 21/21 23/23 36/14 37/14 37/14</p> <p>filing [10] 20/19 59/9 59/14 64/21 73/23 77/15 82/14 82/16 97/18 125/8</p> <p>filings [5] 65/21 65/23 76/15 105/3 136/16</p>	<p>fill [1] 109/21</p> <p>final [6] 34/15 64/2 64/6 89/13 104/8 134/14</p> <p>finalized [1] 49/20</p> <p>finally [4] 4/15 25/17 28/6 78/7</p> <p>financial [1] 14/24</p> <p>find [21] 14/23 35/25 69/17 95/16 96/9 97/13 97/15 97/21 98/2 98/3 99/21 106/18 112/20 124/19 124/21 126/8 130/12 131/4 131/13 133/11 136/1</p> <p>finding [12] 17/11 19/22 21/9 21/9 36/10 36/11 36/12 36/15 64/24 72/10 78/1 78/3</p> <p>findings [2] 21/12 130/14</p> <p>finish [1] 69/25</p> <p>firearm [1] 32/22</p> <p>fired [1] 95/3</p> <p>first [24] 3/6 6/3 8/12 21/2 24/11 34/24 43/11 54/7 55/24 67/14 70/4 70/25 78/11 92/3 96/8 96/9 102/13 103/20 106/22 108/9 108/12 109/15 117/24 122/1</p> <p>Fisher [27] 7/12 16/25 17/7 62/12 62/15 63/7 63/11 64/3 84/15 84/24 86/20 87/18 87/22 88/3 88/9 93/12 93/13 93/15 95/24 109/16 116/13 116/13 116/14 116/17 116/18 116/24 117/3</p> <p>five [4] 30/19 42/18 42/24 109/11</p> <p>fix [1] 51/4</p> <p>flat [1] 17/23</p> <p>flat-out [1] 17/23</p>
---	---	--

F

flatly [1] 53/4
flaws [2] 90/25 99/13
flight [18] 12/16 12/23
 12/23 13/8 13/13 13/16
 14/17 56/22 56/23 67/8
 67/8 67/11 67/12 85/10
 86/7 86/7 86/9 91/4
flights [4] 13/20 108/7
 118/23 130/2
floor [3] 2/11 2/14 5/1
Florida [3] 19/12 35/1
 133/2
flying [2] 14/12 14/18
focus [5] 49/2 89/9 90/17
 102/6 107/14
focused [1] 66/2
focuses [1] 61/18
focusing [3] 49/4 117/16
 127/23
Fokker [15] 27/21 28/8
 28/18 72/15 72/16 74/9
 74/11 74/17 75/15 105/13
 106/4 106/8 109/16 114/10
 115/21
folks [3] 81/11 104/18
 106/24
follow [7] 47/12 91/18
 96/23 102/13 104/11
 125/10 127/9
follow-up [1] 96/23
following [2] 24/13 98/14
footnote [2] 39/2 52/5
footnotes [1] 38/16
footprint [1] 97/23
foregoing [2] 138/5 138/6
foreign [10] 57/24 66/21
 66/22 66/22 66/23 90/21
 90/21 118/17 118/18 130/24
foreign-based [1] 66/22
foreseeability [9] 63/13
 63/17 64/4 89/11 90/8

92/10 95/20 132/16 132/19
foreseeable [2] 66/13
 132/23
Forkner [22] 58/15 60/9
 60/11 61/4 61/21 65/20
 65/24 68/11 68/12 68/21
 75/22 84/16 89/19 90/18
 94/10 94/23 95/11 95/19
 97/22 97/25 102/21 131/18
form [5] 9/3 33/7 33/9
 66/13 114/25
formal [1] 77/23
format [1] 138/12
forms [2] 93/21 107/1
formulation [1] 43/3
FORT [9] 1/3 1/7 1/22
 2/24 42/14 52/6 136/18
 138/19 138/20
forth [37] 32/7 46/17
 57/1 57/9 57/19 58/13
 58/17 58/25 59/14 59/19
 61/5 62/4 62/11 63/19
 64/12 64/19 64/20 68/14
 68/22 68/25 78/18 78/20
 81/19 83/16 92/20 95/7
 97/8 97/9 97/18 98/17
 99/2 99/11 102/19 102/21
 102/23 103/7 103/16
forthrightly [1] 23/8
forum [2] 85/18 85/19
forward [5] 82/5 84/9
 125/3 130/10 136/9
found [3] 119/19 128/15
 129/23
foundation [3] 63/4 64/17
 64/18
four [10] 5/5 8/8 13/12
 28/14 30/19 61/4 80/21
 108/11 125/16 127/12
fourth [4] 15/9 29/25
 34/19 108/21
France [1] 4/2

frankly [1] 50/1
fraud [1] 61/4
fray [1] 27/17
freestanding [1] 74/23
front [12] 5/5 15/20 16/16
 19/11 22/6 29/12 32/6
 38/11 41/15 56/10 111/18
 131/8
FSB [3] 117/25 118/2 118/4
fulfill [1] 73/7
fulfilled [1] 73/8
full [3] 20/2 125/16 125/18
fully [2] 78/25 125/21
function [1] 14/4
fund [4] 39/18 41/21 41/21
 120/15
fundamental [2] 10/12
 21/24
fundamentally [1] 126/2
funding [1] 120/14
further [11] 58/22 61/8
 64/7 68/24 75/6 102/18
 129/21 130/11 130/14 138/8
 138/12
future [2] 74/19 127/16

G

Garland [3] 101/9 133/16
 133/24
Garner [1] 27/4
Gas [1] 16/18
gather [2] 16/19 62/3
gathered [1] 101/15
Gathering [1] 16/18
gave [1] 9/22
general [12] 58/6 59/11
 65/5 101/6 104/8 104/9
 108/15 115/25 116/5 131/12
 133/16 133/24
generally [2] 99/18 107/24
generous [1] 133/17
get [29] 5/7 18/10 32/24
 38/12 43/10 46/24 46/24

<p>G get... [22] 48/2 49/5 52/1 52/10 53/11 54/25 55/11 64/23 80/16 83/21 89/8 89/8 94/15 99/14 99/18 100/20 112/17 119/1 120/18 127/21 133/13 136/20 getaway [1] 87/9 gets [1] 48/5 getting [1] 83/20 Ghislaine [1] 37/25 give [16] 6/16 15/17 16/19 19/1 19/19 23/1 39/5 45/23 50/14 55/15 56/14 86/23 129/4 133/21 134/16 134/18 given [3] 19/17 19/18 107/1 gives [2] 26/15 134/22 giving [1] 18/17 gmail.com [1] 138/21 go [42] 12/15 13/24 18/5 20/5 20/13 32/11 32/15 37/22 38/23 38/25 41/1 45/9 50/14 57/6 64/16 66/10 66/10 66/12 69/25 70/1 79/16 81/5 81/13 82/12 82/23 83/2 88/6 90/23 90/25 91/6 94/1 94/14 101/11 110/5 113/10 113/25 120/6 121/3 124/15 126/8 128/16 129/23 goes [6] 28/1 36/25 69/10 81/9 83/6 126/14 going [51] 6/13 6/22 17/10 18/13 19/21 21/12 23/16 24/20 24/21 25/10 28/17 30/3 30/8 33/1 33/10 33/15 35/16 36/10 36/16 36/17 39/25 40/11 40/22 42/1 43/14 44/3 45/5 50/10 51/22 52/10 55/5 75/4 81/13 84/12 85/5</p>	<p>99/6 104/15 106/6 110/14 110/18 117/9 117/20 125/3 126/3 126/5 126/10 126/12 127/20 128/5 129/10 133/23 going on [1] 45/5 gone [1] 98/8 good [21] 3/12 3/13 3/15 3/18 4/12 4/16 4/23 4/25 26/5 34/21 43/5 46/16 56/18 73/2 82/23 83/1 84/8 107/7 107/8 110/3 127/2 good-faith [2] 82/23 83/1 goodness [2] 39/24 42/24 got [6] 5/8 36/7 37/4 40/15 100/2 128/10 gotten [1] 130/20 GOULD [1] 2/23 government [119] 1/7 1/19 4/11 5/15 6/3 6/9 6/10 6/16 6/20 7/19 8/22 9/2 9/16 10/9 11/10 11/13 11/21 13/23 14/8 14/14 14/15 16/14 17/19 18/2 18/5 18/21 19/2 19/14 19/24 20/6 21/14 22/9 23/1 23/4 23/6 23/7 23/10 23/14 23/16 23/21 24/18 24/23 25/3 25/7 25/23 26/3 26/19 27/12 28/23 29/7 29/10 30/8 30/18 31/15 33/14 34/2 36/4 36/13 37/4 37/7 37/14 38/3 40/14 40/17 41/17 42/13 45/1 47/20 52/12 52/22 53/13 54/15 55/25 56/14 58/1 59/1 59/9 59/22 60/22 61/20 69/3 70/4 70/8 70/17 70/25 74/22 76/12 78/5 79/17 79/17 79/18 80/2 80/17 80/25</p>	<p>81/9 86/14 93/19 106/13 113/22 121/23 123/19 126/22 127/23 128/8 129/25 131/3 131/5 131/7 131/17 131/21 132/1 132/12 132/20 132/25 133/7 134/24 135/6 135/19 136/2 government's [15] 7/18 10/5 14/6 14/11 31/19 51/2 60/5 60/25 61/2 62/11 65/21 73/23 79/22 113/2 134/25 graduate [1] 89/6 grant [4] 24/1 34/19 56/12 136/10 granted [5] 47/24 70/9 70/11 108/13 123/22 granting [4] 37/7 45/12 112/7 125/9 grants [2] 45/10 45/11 grappled [1] 79/10 great [4] 3/22 25/25 37/15 131/16 grieving [2] 9/23 135/9 ground [5] 72/18 72/19 72/25 75/11 115/24 grounds [1] 75/17 guess [5] 40/2 70/17 88/10 92/21 103/13 guidelines [3] 39/10 59/16 69/11 guilty [3] 54/25 54/25 72/20 Gun [1] 89/6 Gustavsson [1] 94/23 guts [1] 55/17</p> <hr/> <p>H</p> <hr/> <p>had [63] 8/8 13/1 13/13 13/17 15/24 22/25 24/13 30/7 31/10 35/1 35/3 35/6 36/4 37/9 37/15 43/10 45/7 46/12 46/13 47/19</p>
--	---	---

<p>H</p> <p>had... [43] 49/5 50/23 50/24 50/25 53/16 63/25 65/8 66/17 74/4 81/18 84/13 84/18 86/7 87/21 88/3 88/17 90/24 93/10 93/15 95/2 95/3 95/5 95/10 105/6 109/21 109/24 110/9 110/20 111/9 111/17 111/19 112/4 115/22 118/22 121/1 121/9 121/10 122/6 123/14 124/7 127/12 127/25 129/8 hadn't [1] 25/22 half [6] 13/12 14/9 78/4 115/18 120/14 120/21 half-truths [1] 14/9 hall [1] 30/2 handed [1] 14/6 handle [1] 33/23 handled [3] 20/8 71/4 71/12 HANEY [2] 2/19 4/18 happen [3] 11/8 38/18 86/8 happened [22] 13/13 15/15 19/13 20/15 34/16 35/23 44/1 46/23 48/20 49/12 72/20 82/9 94/20 99/12 112/5 113/12 119/1 127/17 131/20 131/21 135/17 135/21 happening [1] 26/1 happens [5] 6/13 20/16 31/2 32/21 125/6 happy [2] 80/22 99/6 hard [1] 53/11 harder [2] 48/12 48/13 harm [17] 13/5 14/24 14/24 14/25 15/3 62/12 62/12 63/7 63/11 63/16 88/8 116/22 117/2 132/11</p>	<p>132/13 132/14 132/15 harmed [9] 7/6 57/12 62/8 63/2 63/14 86/24 86/24 100/10 130/8 harms [1] 132/22 has [111] 4/6 6/9 6/10 7/18 7/19 8/6 8/23 10/9 11/6 11/10 12/1 13/23 15/20 16/14 16/23 18/2 18/17 20/19 25/9 26/4 26/5 27/5 28/15 30/6 31/5 31/23 32/24 33/11 33/13 37/6 40/14 42/6 42/13 46/6 47/9 52/19 52/22 53/23 54/13 55/25 59/13 59/13 61/2 62/19 66/16 73/8 74/12 74/15 74/23 75/18 75/23 76/4 76/12 77/1 77/6 78/14 78/16 78/17 79/11 84/4 93/21 94/17 98/7 98/25 99/1 101/6 101/9 101/13 105/15 105/15 106/1 107/10 107/11 107/11 107/16 107/18 109/1 109/12 110/14 110/16 111/14 112/2 112/3 112/14 113/16 113/22 113/23 114/5 114/14 114/21 115/17 115/18 116/3 116/8 117/16 119/20 119/21 120/12 120/13 122/20 124/18 125/3 125/14 125/16 125/18 125/19 125/21 125/22 126/13 132/5 136/7 HATCH [5] 2/15 2/22 4/16 4/22 107/8 have [229] haven't [4] 8/24 39/24 55/3 82/2 having [7] 66/25 78/1 104/25 112/14 130/23 130/24 134/4</p>	<p>he [27] 4/8 19/21 20/1 20/21 25/19 36/9 36/12 37/11 37/13 50/16 50/16 50/18 54/18 87/22 88/16 88/17 88/18 88/18 101/9 110/25 112/14 119/8 119/10 121/4 133/24 133/25 135/2 he'd [1] 35/2 He's [2] 4/7 112/13 head [2] 92/12 99/8 hear [11] 28/23 30/22 52/12 76/23 84/7 131/5 131/17 131/18 132/12 135/25 138/7 heard [36] 10/23 11/7 34/10 46/14 48/25 57/5 58/12 58/14 59/7 61/16 61/19 68/11 75/22 81/24 85/13 90/13 94/9 95/9 104/4 110/15 110/16 111/21 112/19 115/19 123/14 125/5 125/19 125/21 126/6 126/13 128/1 128/14 134/6 134/24 135/2 135/6 hearing [28] 1/13 5/4 10/14 15/18 15/24 16/7 16/10 16/12 35/1 35/2 38/12 41/24 46/9 48/23 76/7 78/3 110/15 111/18 111/22 123/20 124/4 124/5 124/7 125/11 125/24 126/3 131/2 132/7 hearings [5] 77/22 102/21 102/21 126/11 130/11 heart [1] 63/25 held [6] 11/3 28/15 31/6 62/12 105/15 136/8 help [4] 21/18 22/21 34/25 130/18 Henriquez [2] 91/21 93/24 her [3] 4/2 44/11 114/4 here [140]</p>
---	--	---

<p>H here's [13] 14/1 14/6 14/10 20/6 20/7 20/8 32/5 35/23 41/3 46/16 51/3 55/4 65/17 hey [4] 19/16 27/23 28/16 55/11 hide [2] 96/12 96/13 Higginbotham [2] 84/15 86/20 high [5] 63/25 69/8 69/18 69/18 105/23 high-level [3] 69/8 69/18 69/18 high-speed [1] 63/25 higher [2] 39/18 64/10 highest [1] 52/8 highlighted [1] 25/21 highlights [1] 29/16 him [1] 88/20 himself [2] 50/19 101/6 his [13] 4/4 4/8 58/6 60/12 84/16 88/9 88/10 95/9 108/15 112/16 114/3 133/17 134/2 historically [1] 29/13 history [2] 7/7 109/20 hold [6] 34/8 56/15 77/16 110/20 124/9 134/19 holding [5] 8/3 98/1 113/13 129/17 136/6 holds [1] 132/4 homicide [1] 96/5 homicides [1] 136/4 honest [2] 82/23 83/1 Honor [103] 3/8 3/13 3/20 4/12 4/16 5/2 7/21 11/14 13/3 17/20 22/24 23/13 23/19 25/9 25/15 27/19 32/20 33/21 47/9 54/10 56/18 56/20 56/25 57/5 58/22 58/25 59/22 61/8</p>	<p>62/3 62/7 63/10 63/16 64/7 64/12 66/11 67/16 68/16 68/18 69/21 70/25 71/22 71/24 73/11 73/11 74/8 75/9 76/6 78/7 78/21 79/11 80/8 81/4 83/10 85/12 85/13 86/18 91/15 93/18 93/24 94/5 96/8 96/16 100/12 101/3 103/6 104/5 106/3 106/18 107/8 107/10 107/23 108/7 109/12 109/18 110/3 112/11 114/21 115/22 116/7 116/11 116/12 116/14 117/11 118/24 119/4 119/4 119/9 119/19 121/1 121/16 122/4 122/11 122/14 123/6 125/13 126/16 127/1 127/3 132/13 136/7 136/22 136/23 136/24 Honor's [4] 20/17 86/3 115/2 124/13 HONORABLE [1] 1/14 hope [6] 29/22 41/16 51/19 56/12 123/5 136/10 hoping [1] 100/20 host [1] 77/1 hours [2] 45/13 45/14 Houston [1] 47/14 how [30] 9/14 10/3 13/17 13/22 15/10 22/5 22/19 23/10 23/16 25/24 31/14 36/9 44/24 49/8 49/15 62/16 64/2 64/3 65/25 66/12 67/10 81/5 83/7 89/12 101/1 101/20 105/4 128/1 133/5 135/8 however [4] 59/17 69/3 71/17 104/2 HSBC [14] 74/10 74/10 74/21 74/22 105/13 106/8 106/11 106/12 109/16</p>	<p>114/10 115/21 116/4 122/5 126/17 human [2] 10/12 21/24 humor [1] 96/14 hundreds [1] 89/15 hurt [1] 52/4 hyperbole [1] 15/21 hypothetical [5] 96/11 97/3 100/17 109/8 135/12 hypothetically [1] 96/14 hypotheticals [1] 96/19</p> <hr/> <p>I I'll [3] 65/6 103/21 134/1 I'm [56] 11/21 15/10 19/21 23/14 24/17 25/10 27/24 28/17 29/5 29/22 32/8 36/10 37/9 39/10 39/11 39/25 40/11 40/12 40/20 40/25 42/1 42/25 46/19 47/14 49/11 51/19 51/24 53/3 53/10 75/22 79/12 83/5 83/5 88/22 89/1 89/22 91/11 91/16 95/13 95/13 98/25 100/4 100/14 100/19 101/9 103/13 105/18 106/6 110/14 119/10 120/8 121/6 123/6 124/22 127/7 132/20 I've [20] 5/8 12/1 12/6 16/11 19/10 22/2 25/6 30/19 37/11 41/7 43/17 43/20 44/20 46/15 80/6 80/20 100/21 123/4 134/22 136/16 IAN [2] 2/22 4/21 idea [1] 64/25 identified [7] 12/7 24/5 36/21 41/7 41/7 60/8 129/18 if [125] 6/7 6/24 12/11 15/17 15/24 16/3 16/5 17/7 18/3 19/22 21/9 21/11 22/5</p>
---	---	---

<p>I if... [112] 22/25 23/19 24/1 24/8 25/9 25/25 31/23 32/5 32/11 32/15 33/3 33/21 35/2 35/19 38/18 39/4 39/21 41/15 41/20 41/23 44/10 44/23 46/11 47/9 47/12 48/11 50/9 50/17 51/8 53/6 53/7 53/16 54/18 54/20 55/9 59/5 68/13 69/22 73/3 73/17 75/2 76/10 79/16 80/24 81/5 81/12 82/5 82/19 82/23 83/1 83/2 83/12 83/23 86/17 89/5 90/24 91/18 93/8 94/3 95/15 96/6 97/24 97/24 98/15 98/16 98/18 99/23 100/1 100/9 101/1 101/3 101/17 102/5 102/6 102/6 103/14 105/22 105/23 106/12 106/18 106/18 107/4 113/19 113/21 115/11 116/21 116/22 117/8 118/20 119/4 122/19 123/17 123/18 124/7 124/14 124/19 124/20 124/22 125/6 125/10 126/22 127/1 127/5 127/16 130/7 130/14 131/1 132/7 132/24 133/7 135/2 136/7 II [2] 16/25 17/7 III [1] 113/4 Ike [1] 4/5 illegal [1] 88/19 Illinois [1] 2/14 illustrate [1] 117/21 imagine [3] 10/7 53/6 84/15 immeasurable [1] 56/21 immediately [9] 14/19 15/6 15/13 18/5 67/7 86/6 86/7</p>	<p>86/9 91/4 imminent [1] 124/11 immunity [2] 37/24 53/3 immunized [2] 11/17 52/21 impact [3] 93/12 93/14 118/21 impacted [1] 104/22 impacts [1] 108/4 impairing [1] 14/2 impeded [1] 14/11 impingement [1] 113/19 implementation [1] 74/24 implication [1] 55/3 implications [2] 61/25 101/25 import [3] 65/9 97/17 97/20 important [13] 5/21 21/25 32/17 44/25 45/18 60/14 61/25 79/23 111/3 113/18 116/25 127/14 129/10 importantly [3] 62/14 78/21 86/2 impose [2] 33/18 53/24 imposed [2] 18/14 33/1 imposes [1] 63/12 improper [4] 41/22 41/23 41/25 42/3 improperly [4] 13/10 42/8 67/10 91/4 improved [1] 61/3 improvident [1] 70/10 in [649] in 2008 [1] 50/4 In re [3] 35/22 70/3 81/8 In re Dean [4] 47/15 70/5 82/10 124/14 In re Dean's [1] 124/1 In re Wild [3] 79/11 112/18 128/15 inaccurate [2] 9/24 71/3 inadequate [2] 41/22 42/1</p>	<p>incentives [1] 99/17 inclined [1] 12/12 include [5] 15/1 66/25 77/3 95/17 132/3 included [5] 10/22 118/11 120/14 120/15 120/16 including [5] 7/12 68/4 77/7 85/24 104/2 incorporates [1] 64/4 incorrect [1] 69/20 incorrectly [1] 92/3 incredibly [2] 82/1 107/4 incurred [1] 89/12 independent [1] 12/6 indicate [2] 27/19 123/12 indicated [1] 87/13 indicates [1] 90/19 indicted [1] 68/21 indicting [1] 99/24 indictment [3] 33/7 93/9 131/22 indisputable [1] 108/19 individual [12] 63/24 68/20 68/23 73/1 86/23 87/3 87/6 87/10 88/2 89/20 94/24 98/1 individual's [1] 87/5 individuals [7] 59/7 60/13 66/13 71/6 84/19 96/6 96/24 indulgence [2] 107/13 107/17 inestimable [1] 108/4 inevitably [2] 17/11 25/2 inflicted [1] 15/3 information [48] 5/15 9/24 10/2 13/24 14/1 21/6 21/11 21/13 21/21 22/13 22/21 23/1 23/5 23/11 23/18 23/22 23/25 25/14 34/13 40/12 51/23 57/2 57/18 57/22 58/17 60/17 60/23</p>
--	---	--

<p>I information... [21] 61/6 61/22 65/1 68/4 71/3 71/9 71/13 76/4 76/13 83/14 91/12 95/18 106/22 109/3 113/24 117/17 117/18 117/22 117/23 130/4 134/9 informed [4] 61/10 61/13 66/5 105/1 inherent [6] 16/15 22/6 28/21 29/17 36/9 121/24 initial [4] 44/11 45/10 123/14 127/9 initially [4] 7/13 45/10 70/9 78/24 initiated [1] 84/20 injury [2] 50/11 96/6 innocent [3] 15/19 23/2 132/22 input [2] 19/7 110/19 inquired [1] 136/14 inquiry [6] 64/2 67/18 67/19 75/13 75/13 131/7 inside [1] 87/3 insinuating [1] 65/2 instance [1] 103/17 instances [2] 77/14 77/15 Instead [1] 11/19 instructs [1] 74/11 instrument [1] 60/9 insult [1] 50/11 intend [2] 76/16 133/8 intended [1] 48/11 intends [1] 73/6 intent [5] 66/16 97/21 97/22 99/22 115/12 intention [2] 71/21 76/13 intentionally [1] 7/8 interest [4] 23/24 23/25 33/9 124/19 interested [1] 35/19 interesting [8] 27/11</p>	<p>28/23 30/22 31/15 32/1 38/3 49/22 133/1 interfering [3] 14/3 14/5 42/8 interim [1] 65/23 internal [1] 59/15 internally [2] 61/14 104/4 interpret [2] 31/14 115/22 interpretation [4] 27/14 105/8 108/25 134/12 interpreted [1] 31/8 interpreting [2] 103/4 119/24 intervening [2] 42/4 44/17 into [32] 5/16 5/19 8/10 9/5 9/20 24/6 25/8 27/17 38/24 39/18 41/20 41/21 42/4 46/24 59/3 62/21 65/2 65/10 81/6 81/9 87/10 94/1 97/20 109/10 109/25 110/1 120/3 122/11 124/23 133/13 133/20 133/23 introduce [3] 3/10 3/21 62/21 intruding [1] 42/9 intrusion [1] 129/7 invalidating [1] 113/8 invalidation [1] 37/23 investigate [2] 16/15 58/1 investigated [4] 59/22 109/8 121/5 121/8 investigating [4] 8/20 9/2 9/13 9/25 investigation [18] 6/22 8/13 8/15 9/5 9/9 9/17 9/20 10/5 10/7 53/19 56/1 60/1 68/4 69/5 101/16 114/4 127/15 127/17 investigations [2] 71/17 85/4 investigative [2] 127/19</p>	<p>129/22 invited [2] 61/15 66/9 involve [3] 12/10 15/10 23/20 involved [10] 8/18 15/11 20/19 21/17 48/3 53/15 59/11 67/13 80/16 87/25 involvement [2] 69/8 69/18 involves [3] 12/2 67/21 132/6 involving [5] 61/6 77/21 131/14 135/10 136/3 ironically [1] 9/16 irony [2] 51/6 51/25 is [342] isn't [6] 15/21 37/25 76/21 89/3 106/23 135/22 issue [33] 5/19 6/14 6/25 7/2 7/14 7/19 17/8 18/9 29/11 33/5 38/14 44/5 56/24 70/12 70/24 73/13 74/16 78/25 81/18 81/19 82/12 83/17 90/8 98/8 99/3 102/17 107/3 124/6 124/6 125/23 131/9 131/10 133/13 issued [1] 13/15 issues [37] 5/13 23/12 23/19 38/17 41/2 48/6 57/21 57/24 61/23 65/19 65/20 66/5 66/19 66/22 66/24 67/5 67/7 67/12 67/13 67/15 67/21 68/15 69/22 79/10 85/1 85/21 86/6 90/24 91/1 95/1 95/19 107/14 108/8 113/18 125/17 125/21 130/19 it [286] it's [86] 5/24 11/19 15/13 17/4 19/10 20/6 22/20 23/6 24/14 26/17 28/23 31/2 31/15 31/22 32/1</p>
--	--	---

<p>I it's... [71] 32/16 33/8 33/15 42/14 43/3 43/24 44/24 45/3 46/6 46/18 46/20 47/6 49/22 49/24 50/9 52/24 53/4 53/12 54/19 54/19 55/19 63/4 64/18 64/20 72/18 72/19 74/12 74/14 74/18 75/11 75/12 75/13 77/17 77/20 80/3 80/15 81/22 82/12 83/25 84/2 84/2 87/24 88/6 88/7 89/12 90/13 93/23 94/18 94/20 97/11 104/13 110/10 114/6 114/19 114/24 115/19 116/10 117/4 117/9 118/1 120/21 120/25 122/22 123/3 124/9 126/10 126/10 126/22 127/14 127/24 133/1 items [1] 26/8 its [36] 7/20 10/10 22/16 22/19 28/21 29/18 36/14 40/15 55/25 56/16 59/15 60/8 67/1 69/5 70/18 72/6 73/3 73/7 73/8 75/18 75/18 75/23 77/1 77/15 80/11 94/8 95/1 101/14 108/2 108/5 110/21 118/3 118/11 120/13 122/8 126/22 itself [9] 31/19 32/18 49/22 52/8 54/8 55/23 69/23 90/24 103/4</p>	<p>Java [2] 12/16 12/20 Jeffrey [4] 19/12 35/24 37/16 47/10 JERROB [3] 1/20 4/12 56/19 job [1] 105/4 judge [72] 1/14 19/11 19/16 19/21 27/23 30/4 35/2 35/4 35/7 36/7 36/15 36/20 37/3 37/6 37/18 42/7 42/18 43/22 44/5 44/18 44/18 45/3 45/3 45/3 46/8 46/10 46/12 46/15 46/21 46/25 47/3 47/10 48/6 48/16 48/21 48/24 49/1 49/23 50/1 50/5 50/17 50/24 54/13 54/16 55/7 65/11 68/9 78/9 78/10 81/25 82/7 84/14 86/19 88/16 91/25 93/11 98/7 101/8 103/18 109/22 110/14 110/18 110/22 110/23 111/8 122/22 123/12 123/13 123/16 124/25 125/2 129/2 judges [6] 28/10 53/24 53/24 55/16 81/18 81/24 judgment [3] 37/5 37/7 122/22 judicial [5] 42/9 79/15 80/8 125/7 138/13 July [1] 37/16 jump [2] 5/19 27/17 junior [1] 60/11 jurisdictions [1] 118/19 jury [10] 7/21 32/1 32/3 32/5 32/6 53/6 62/25 75/23 88/7 132/5 just [78] 5/18 7/17 12/6 17/23 20/18 22/2 24/22 25/6 28/16 29/8 33/6 34/24 36/19 38/22 43/14</p>	<p>47/6 47/12 47/13 47/14 52/11 53/12 53/18 54/16 65/15 72/9 77/18 77/25 80/6 80/23 81/19 81/23 82/17 84/10 85/8 86/16 86/17 86/18 89/11 89/24 91/18 93/23 96/10 96/13 96/14 96/21 98/5 98/19 100/5 100/21 102/25 103/18 103/24 113/5 114/6 115/5 115/11 115/14 117/20 118/24 118/25 119/7 120/4 120/7 120/9 120/23 121/7 121/15 122/5 122/10 124/8 124/9 124/22 129/13 129/23 131/13 133/15 134/11 136/20 justice [21] 5/23 8/20 9/5 9/10 9/22 10/3 10/18 22/16 22/19 33/10 34/5 51/21 52/9 59/13 67/24 71/7 71/14 96/3 99/24 104/11 127/19 Justice's [1] 71/2 justification [2] 31/11 40/9 justifications [1] 72/23 justify [1] 135/23</p> <hr/> <p>K</p> <p>keep [1] 49/23 kept [1] 45/8 key [10] 7/18 14/10 39/1 89/21 90/9 90/12 90/14 112/6 129/1 129/16 killed [2] 7/3 15/18 kind [7] 7/18 15/1 16/12 18/20 20/20 34/24 115/13 kinds [5] 7/25 23/21 26/16 86/15 92/1 KIRKLAND [2] 2/20 4/18 knew [5] 51/12 90/10 90/11 94/23 94/24 know [125] 5/5 5/6 8/17</p>
<p>J Jackson [1] 2/8 Jane [1] 121/20 January [5] 9/4 60/25 68/21 72/10 83/15 January 24th [1] 72/10 January 7th [1] 60/25 January 7th of [1] 83/15</p>		

<p>K know... [122] 11/10 12/22 12/22 13/1 13/2 13/22 15/9 17/19 18/9 21/16 29/19 33/15 33/22 36/5 37/12 38/15 44/10 46/6 46/15 50/1 64/4 66/1 66/4 66/7 66/10 70/19 72/12 72/13 72/25 74/7 74/16 77/7 78/1 78/4 78/16 78/18 79/14 80/8 80/10 82/12 82/13 82/13 82/15 83/9 83/16 83/18 83/21 83/23 84/6 84/9 84/23 85/22 86/14 87/6 87/7 87/17 87/18 87/18 87/21 88/6 89/1 89/5 89/10 89/15 89/25 90/2 90/3 90/4 90/6 90/19 90/24 92/9 92/11 92/13 93/12 94/25 95/1 95/2 95/3 98/1 99/12 99/17 101/5 101/17 101/18 101/19 101/21 101/25 102/14 102/15 102/17 104/10 104/20 106/7 106/14 109/8 109/20 110/4 112/18 113/21 114/15 115/23 116/1 116/7 117/16 117/21 122/19 124/6 124/8 124/20 125/12 126/18 127/5 127/16 128/1 128/2 128/9 130/2 131/14 131/20 132/4 133/13 knowing [1] 42/16 known [7] 66/13 88/18 89/19 89/19 89/19 91/2 91/2 knows [3] 61/3 116/11 131/20 KREINDLER [4] 2/10 2/10 3/14 3/14</p>	<p>L lack [2] 69/7 85/18 lacks [1] 75/16 laid [3] 8/13 23/15 27/12 Lake [1] 2/5 land [3] 86/10 91/5 130/25 landed [1] 67/11 language [9] 14/10 26/22 27/1 30/15 31/22 31/22 53/25 63/12 115/8 large [2] 94/7 100/16 LaSalle [1] 2/14 last [17] 7/17 19/10 20/18 25/18 35/19 46/20 52/11 52/13 53/22 54/1 68/21 83/15 106/10 109/21 112/9 119/3 136/6 later [10] 18/23 19/15 50/18 60/12 61/23 68/22 89/18 89/23 114/23 134/1 law [25] 2/3 2/13 3/17 28/11 28/13 28/19 29/4 29/5 30/10 35/18 35/18 100/13 103/3 109/2 109/10 109/10 111/20 112/14 116/7 116/21 119/24 119/25 120/6 132/14 135/11 lawful [1] 14/4 laws [1] 70/23 lawyer [1] 15/21 lawyers [1] 30/7 lay [1] 21/7 lay out [1] 21/7 lays [1] 15/23 lead [3] 3/11 22/22 66/7 leading [1] 65/13 learn [3] 10/8 59/14 113/11 learned [1] 19/15 learning [1] 89/24 least [10] 25/11 49/10 53/23 81/1 81/22 91/24 99/15 126/18 127/20</p>	<p>136/14 leaves [1] 128/25 led [7] 57/20 60/20 66/5 78/2 85/1 85/14 97/4 legal [3] 56/24 59/3 108/8 legislative [1] 7/7 length [2] 78/20 110/17 lengthy [1] 110/23 lenient [5] 28/11 28/17 74/16 75/18 75/20 lens [3] 115/13 115/21 126/24 less [2] 27/14 86/7 lesser [1] 114/24 let [33] 5/18 8/10 8/12 12/25 13/6 14/22 24/5 27/17 34/21 39/7 39/21 43/6 44/7 44/23 60/5 65/15 72/1 80/23 82/17 84/10 85/8 91/8 95/25 96/2 98/24 99/23 100/21 125/23 125/24 127/8 127/16 133/15 133/19 let's [16] 3/6 9/21 11/11 12/15 13/24 17/19 20/9 21/7 51/20 94/22 96/10 96/11 129/23 131/1 131/2 132/7 letter [2] 64/19 102/13 level [7] 69/8 69/18 69/18 118/5 118/5 118/6 121/21 Level-B [1] 118/6 levels [1] 66/20 Lexington [1] 2/11 liability [8] 68/19 68/23 68/24 97/9 97/12 98/25 100/10 119/15 liable [2] 66/15 98/23 liberty [1] 7/23 lied [2] 89/22 132/17 lies [4] 12/8 15/18 16/21 17/14</p>
---	--	---

L
life [1] 12/21
life-or-death [1] 12/21
light [4] 61/24 98/16
 107/25 125/24
like [35] 3/10 3/21 6/25
 10/9 10/13 16/3 17/15
 17/18 22/25 25/5 29/23
 30/5 30/9 38/18 39/22
 41/5 49/12 53/1 53/6
 53/17 55/15 55/16 62/5
 68/15 69/21 70/1 70/24
 82/12 89/6 91/24 117/7
 120/1 124/9 135/13 136/1
likewise [1] 29/15
limit [4] 54/20 54/22 55/5
 55/6
limitation [3] 97/9 97/11
 98/25
limitations [1] 106/5
limited [14] 64/18 64/19
 64/20 69/3 74/12 80/5
 80/6 90/14 91/11 93/8
 94/10 97/16 99/11 107/1
limiting [3] 79/20 128/2
 128/3
line [9] 35/5 41/5 52/23
 55/21 89/23 89/23 114/17
 119/9 119/17
lines [3] 89/23 106/16
 130/12
link [1] 130/22
linked [1] 132/21
Lion [6] 12/16 13/13 56/22
 67/7 99/25 108/6
list [1] 67/22
listed [1] 20/21
listening [1] 133/23
litany [1] 85/1
literally [1] 21/16
litigant [1] 46/4
litigated [3] 78/25 112/15

133/3
litigation [10] 8/18 21/17
 35/17 61/2 64/8 68/10
 77/8 83/24 113/12 114/9
little [7] 8/23 11/13 34/3
 41/4 65/6 65/15 129/13
lives [1] 84/19
living [1] 62/18
LLC [2] 2/10 2/23
LLP [4] 2/7 2/17 2/20 3/14
local [3] 12/15 12/18 13/7
Loffing [3] 61/20 85/14
 95/8
logical [1] 19/4
long [7] 39/10 43/24 46/9
 72/24 73/7 100/19 112/15
look [53] 7/13 7/14 13/23
 14/14 17/2 17/4 17/7 17/15
 20/20 22/12 26/6 28/16
 28/22 31/17 32/2 32/4
 37/2 38/17 39/4 39/16
 39/19 39/20 39/22 39/23
 40/7 40/19 40/24 41/1
 42/12 42/24 50/5 52/17
 53/6 55/11 62/23 74/9
 79/14 89/17 92/22 109/6
 113/24 115/9 116/19 116/21
 118/8 122/13 128/17 128/18
 129/19 131/1 131/6 135/17
 136/9
looked [7] 30/5 46/16
 54/13 54/18 86/20 115/24
 121/11
looking [6] 23/22 55/7
 83/7 115/2 116/4 129/2
looks [4] 40/19 98/21
 108/9 109/14
loosely [1] 53/4
lose [1] 38/13
losses [4] 9/14 56/21
 56/23 57/16
lost [5] 4/2 4/4 4/8 84/19

108/6
lot [5] 117/20 128/14
 130/16 131/18 131/25
lots [5] 23/1 131/3 131/6
 131/11 134/9
loved [1] 108/6
low [2] 42/25 95/4
lunchtime [1] 100/20
Lynn [1] 88/16

M

made [20] 11/6 20/11
 50/21 54/15 65/24 72/10
 74/1 77/11 79/3 83/1
 93/15 101/10 101/14 107/22
 118/13 121/2 126/22 129/12
 133/25 134/15
magistrate [1] 30/4
main [1] 5/19
majority [1] 40/17
make [32] 6/13 8/22 10/3
 16/16 17/5 19/7 21/12
 22/16 22/19 25/11 29/20
 33/15 33/25 38/11 46/25
 47/7 48/12 48/12 55/25
 56/23 66/14 71/10 76/21
 78/3 82/22 83/22 96/12
 100/7 100/21 118/16 129/4
 136/17
maker [1] 134/14
makers [1] 134/6
makes [4] 55/18 55/23
 78/1 127/1
making [10] 7/15 28/3
 28/3 34/14 62/23 66/8
 91/9 102/11 105/1 123/14
management [13] 24/13
 24/19 39/17 40/8 52/13
 52/17 52/19 52/19 53/5
 53/7 53/10 53/14 134/8
mandamus [16] 42/6 43/8
 43/10 43/14 44/5 45/9
 45/12 45/20 45/23 46/5

<p>M</p> <p>mandamus... [6] 48/15 109/23 110/13 110/21 123/11 124/24</p> <p>mandamused [2] 39/14 44/15</p> <p>mandatory [1] 31/22</p> <p>maneuver [2] 34/2 89/6</p> <p>manner [1] 67/4</p> <p>manslaughter [11] 11/23 11/25 24/22 96/4 97/25 98/13 99/25 128/6 128/7 128/9 128/11</p> <p>manslaughter-type [1] 99/25</p> <p>manual [3] 12/23 12/24 13/16</p> <p>manuals [1] 14/17</p> <p>many [15] 15/11 30/6 48/10 60/14 67/21 68/5 76/11 85/21 85/23 94/14 94/18 117/1 117/5 117/9 125/20</p> <p>mapped [1] 125/15</p> <p>March [2] 8/19 13/7</p> <p>March 10th [2] 8/19 13/7</p> <p>Marra [15] 19/11 19/16 19/21 36/7 36/20 37/3 37/6 37/18 47/10 50/1 54/13 54/16 55/7 65/11 68/9</p> <p>Marra's [3] 49/23 78/9 78/10</p> <p>MARTIN [1] 2/23</p> <p>masks [1] 138/9</p> <p>Massachusetts [2] 4/1 4/6</p> <p>matter [6] 15/19 71/14 103/3 103/19 126/23 138/7</p> <p>matters [3] 121/5 122/15 122/18</p> <p>MAX [2] 66/25 99/19</p> <p>Maxwell [1] 37/25</p>	<p>may [25] 1/8 3/2 11/14 15/10 20/10 25/1 32/18 42/17 49/11 74/17 85/11 86/17 91/18 94/19 99/17 102/6 104/22 117/13 125/17 126/6 129/20 129/23 130/2 130/6 138/15</p> <p>maybe [7] 26/7 29/10 34/25 99/5 120/9 134/10 134/23</p> <p>MCAS [35] 12/18 12/24 13/10 13/18 14/17 57/22 61/11 61/17 61/23 61/24 66/4 66/25 67/4 67/4 67/10 85/10 85/12 85/15 85/20 85/21 88/25 89/1 89/18 90/6 90/23 94/19 95/1 117/12 118/2 129/19 130/2 130/6 131/11 131/16 132/21</p> <p>McGUIREWOODS [4] 2/17 4/17 4/20 4/24</p> <p>McNulty [5] 62/15 62/22 86/18 91/16 95/25</p> <p>me [52] 5/18 8/10 8/12 13/6 14/22 21/23 24/5 25/13 30/5 34/21 34/25 39/7 39/15 39/21 41/22 41/23 41/25 42/3 43/6 43/7 43/15 44/1 44/7 44/23 60/5 65/15 70/14 72/1 72/3 80/23 82/17 84/10 85/8 91/8 91/12 94/23 96/2 96/14 98/24 99/23 100/2 100/5 100/15 100/16 100/21 103/6 105/24 119/6 119/9 127/8 133/15 133/19</p> <p>MEACHAM [2] 1/19 4/13</p> <p>Meacham's [1] 87/19</p> <p>mean [17] 16/10 30/14 30/21 43/17 51/6 53/16</p>	<p>57/14 76/22 81/21 83/13 83/14 101/19 103/22 117/24 120/9 131/13 135/11</p> <p>meaning [3] 18/1 18/18 103/7</p> <p>meaningful [4] 20/6 36/21 40/1 50/8</p> <p>meaningfully [4] 19/6 20/4 50/13 134/19</p> <p>meaningless [3] 18/21 47/6 55/18</p> <p>means [3] 31/23 59/17 106/15</p> <p>means,' [1] 14/4</p> <p>meant [1] 115/19</p> <p>mechanism [3] 18/20 32/19 106/15</p> <p>mechanisms [1] 78/14</p> <p>meet [8] 48/18 59/10 101/18 102/15 102/18 117/9 124/21 132/10</p> <p>meeting [4] 59/1 133/16 133/20 133/24</p> <p>meetings [4] 61/15 66/5 66/9 101/13</p> <p>meets [1] 105/23</p> <p>member [2] 76/22 76/23</p> <p>members [6] 7/3 9/8 17/25 55/15 130/12 135/10</p> <p>mental [1] 17/9</p> <p>mention [2] 77/7 132/21</p> <p>mentioned [8] 10/16 11/23 12/24 22/2 22/9 122/25 132/20 136/7</p> <p>Merritt [1] 28/14</p> <p>mess [1] 50/22</p> <p>message [1] 89/21</p> <p>met [4] 76/14 76/17 77/1 101/6</p> <p>method [1] 78/12</p> <p>Michael [1] 3/25</p> <p>Michigan [1] 35/18</p>
--	--	---

M

<p>middle [4] 72/18 72/19 72/25 75/10 might [18] 17/4 41/3 42/19 74/19 74/20 74/24 75/6 75/13 76/12 77/22 79/18 86/24 89/5 90/25 97/19 103/17 104/18 124/8 Miles [1] 28/14 Miller [2] 31/15 31/20 Milleron [1] 3/25 millions [1] 21/16 mince [1] 9/21 mind [3] 82/18 82/19 82/21 mine [1] 51/2 minimum [2] 16/6 116/19 minute [8] 19/2 27/18 28/2 33/24 36/2 36/7 37/1 42/20 minutes [1] 14/7 misconduct [3] 74/19 106/13 107/5 mislead [1] 71/21 misleading [3] 14/9 40/16 40/20 misreading [1] 76/9 missed [1] 129/15 mistake [3] 66/14 82/23 83/2 misunderstood [1] 134/23 modeled [1] 73/20 moment [15] 57/7 62/5 62/6 65/8 72/16 73/12 75/10 75/21 78/8 82/14 82/15 83/8 86/17 98/5 123/21 moments [1] 71/24 money [1] 40/17 monitor [1] 74/24 month [1] 57/6 months [5] 10/6 13/12</p>	<p>25/24 61/3 68/22 Moore [3] 4/4 33/4 122/25 moot [3] 37/21 37/23 37/25 more [25] 39/5 40/12 41/4 49/4 50/2 51/25 51/25 58/11 60/11 64/18 64/18 64/20 69/3 76/3 86/7 94/15 99/5 99/11 102/25 105/5 111/25 116/4 123/15 135/12 136/4 moreover [2] 69/15 72/5 morning [21] 3/8 3/11 3/13 3/23 4/12 4/16 5/8 7/24 12/11 15/2 15/12 17/24 18/3 22/1 28/24 30/3 30/6 30/23 33/1 56/18 107/8 most [7] 60/10 62/14 66/8 78/21 82/9 84/4 86/2 motion [39] 5/11 5/12 5/14 5/14 5/18 5/18 21/2 21/4 21/5 21/6 21/10 21/10 24/1 24/4 24/5 29/21 29/25 30/1 34/19 36/14 37/5 56/12 64/13 69/23 70/8 71/22 76/6 78/2 78/8 119/12 119/12 123/20 123/22 123/23 124/4 124/11 125/8 126/22 136/10 motions [16] 1/13 5/4 5/5 7/25 8/1 36/1 36/6 56/8 56/9 58/24 59/9 69/22 80/21 122/12 125/16 134/5 movants [33] 2/3 3/7 3/9 56/25 57/10 58/12 58/20 58/23 59/10 59/19 60/19 64/13 65/2 67/9 68/19 69/2 70/14 70/17 70/25 72/3 73/24 76/5 76/8 77/8 80/3 83/20 83/23</p>	<p>102/15 102/18 109/6 110/16 110/24 125/20 movants' [8] 63/19 64/21 67/21 69/19 78/8 90/20 97/18 125/20 move [7] 12/3 16/13 17/19 21/3 24/4 29/23 76/13 moved [1] 105/19 moving [4] 6/2 54/21 54/23 54/24 Mr [2] 5/1 60/9 Mr. [48] 3/10 58/15 60/11 61/4 61/20 61/21 65/24 68/21 85/14 87/19 87/22 88/3 89/19 93/13 93/15 94/23 94/23 95/8 95/11 95/19 97/22 97/25 105/9 107/22 108/23 109/20 110/25 112/12 112/21 113/8 114/11 114/24 117/15 119/4 119/8 119/20 120/12 121/2 121/14 121/20 122/1 122/12 122/25 124/18 126/9 126/19 128/1 135/2 Mr. Cassell [16] 105/9 107/22 109/20 112/21 114/11 119/4 119/8 119/20 121/2 121/14 121/20 122/1 122/25 124/18 126/9 126/19 Mr. Cassell's [2] 112/12 122/12 Mr. Duffy [7] 108/23 110/25 114/24 117/15 120/12 128/1 135/2 Mr. Epstein [1] 113/8 Mr. Fisher [4] 87/22 88/3 93/13 93/15 Mr. Forkner [12] 58/15 60/11 61/4 61/21 65/24 68/21 89/19 94/23 95/11 95/19 97/22 97/25</p>
--	--	--

<p>M</p> <p>Mr. Gustavsson [1] 94/23</p> <p>Mr. Loffing [3] 61/20 85/14 95/8</p> <p>Mr. Meacham's [1] 87/19</p> <p>Mr. Paul [1] 3/10</p> <p>much [15] 5/2 5/3 21/2 27/13 50/18 58/11 64/12 66/12 76/3 99/11 109/13 112/12 129/21 133/15 133/25</p> <p>multiple [6] 57/23 63/20 70/3 90/2 131/9 131/14</p> <p>murder [4] 22/25 92/7 93/5 94/8</p> <p>murdered [1] 92/14</p> <p>must [17] 20/15 30/12 30/15 30/16 30/17 31/8 31/25 32/6 32/9 50/8 58/6 62/8 62/13 62/23 63/8 76/11 122/21</p> <p>MVRA [2] 73/13 73/15</p> <p>my [32] 3/21 17/25 22/25 25/12 34/11 35/25 39/24 42/24 44/4 49/2 50/2 51/7 52/4 52/9 81/22 82/23 83/2 92/21 93/7 98/4 99/7 105/21 106/10 108/25 116/8 119/19 121/1 127/9 127/9 128/15 138/7 138/11</p>	<p>necessarily [5] 68/1 74/14 93/25 109/17 116/2</p> <p>necessary [6] 76/25 77/19 90/5 116/20 124/3 124/9</p> <p>need [17] 16/2 19/22 25/19 52/12 80/9 100/21 113/20 114/15 122/24 123/3 123/4 123/20 125/11 128/6 128/15 129/7 129/9</p> <p>needed [1] 129/2</p> <p>needs [2] 46/1 110/5</p> <p>negligence [1] 57/15</p> <p>negligent [1] 96/5</p> <p>negotiated [3] 59/18 120/20 120/24</p> <p>negotiations [2] 42/4 83/16</p> <p>neither [3] 22/8 115/4 129/14</p> <p>Netflix [1] 97/19</p> <p>never [18] 6/10 6/13 19/3 19/17 19/17 20/15 25/15 30/20 36/16 38/5 38/6 38/7 53/1 112/23 113/7 113/12 127/17 135/25</p> <p>new [10] 2/11 2/11 32/23 33/19 33/21 79/12 98/16 98/18 98/21 100/13</p> <p>next [4] 21/10 26/13 89/23 129/12</p> <p>nexus [1] 63/8</p> <p>nice [1] 55/18</p> <p>NICHOLSON [2] 2/7 3/9</p> <p>night [1] 45/2</p> <p>Njoroge [1] 4/7</p> <p>no [65] 1/6 6/16 6/20 6/21 9/17 9/20 10/1 10/1 10/2 10/2 10/6 13/1 13/14 13/17 16/11 24/16 26/4 33/13 38/9 46/14 51/5 51/15 52/18 54/7 63/23 66/14 68/19 68/22 68/23 71/5</p>	<p>71/21 74/23 87/13 88/4 91/18 91/18 95/25 103/14</p> <p>105/18 105/18 105/18 108/13 108/18 108/18 109/1</p> <p>113/3 113/5 113/14 113/25 114/18 114/23 114/25 115/16 115/19 119/24 119/25 120/18 121/16 127/7 127/15 128/22 132/5 133/22 136/22 136/24</p> <p>Nobody [1] 130/15</p> <p>nomenclature [1] 95/9</p> <p>none [4] 25/14 59/17 67/5 121/6</p> <p>nonetheless [7] 58/25 61/6 71/19 74/6 76/1 88/4 104/15</p> <p>nonprosecution [8] 19/19 19/25 35/24 36/22 38/5 72/21 112/22 134/17</p> <p>nonpublic [1] 71/16</p> <p>nor [1] 22/8</p> <p>NORTHERN [5] 1/2 1/21 56/6 56/6 138/18</p> <p>nose [3] 12/19 13/11 89/2</p> <p>not [272]</p> <p>note [7] 32/17 63/9 79/8 101/5 101/10 128/17 128/17</p> <p>noted [1] 28/21</p> <p>notes [3] 32/16 51/7 128/15</p> <p>nothing [7] 12/23 24/13 56/23 66/18 90/6 123/17 125/6</p> <p>notice [11] 6/5 6/17 6/18 10/18 10/22 48/2 51/8 54/20 80/1 102/18 102/20</p> <p>notification [2] 70/9 102/23</p> <p>notifications [1] 81/10</p> <p>notified [1] 22/17</p> <p>notify [1] 48/10</p>
<p>N</p> <p>N.W [1] 2/20</p> <p>Nadia [1] 3/25</p> <p>narrow [4] 58/11 76/3 130/18 132/2</p> <p>Natural [1] 16/18</p> <p>nearest [1] 27/7</p> <p>nearest-reasonable-refere nt [1] 27/7</p> <p>nebulous [2] 11/20 126/25</p>		

<p>N</p> <p>notion [2] 119/23 122/2</p> <p>November [1] 61/13</p> <p>now [37] 5/21 8/22 9/21 10/5 10/12 12/5 16/9 17/18 21/23 24/3 25/3 27/1 27/11 30/18 33/20 35/16 37/11 37/12 38/15 49/25 51/6 62/5 67/23 68/15 69/21 82/5 89/24 98/7 105/3 115/18 127/16 127/21 128/14 128/25 129/12 131/5 134/21</p> <p>NPA [4] 37/24 112/25 113/4 113/8</p> <p>number [12] 8/2 29/6 38/10 60/7 60/10 61/21 79/8 89/20 94/24 97/23 98/1 118/4</p> <p>Numerous [1] 64/22</p>	<p>28/11 44/24 54/24 69/24 79/23 81/7 82/14 84/13 101/24 112/14 124/5</p> <p>occasions [4] 57/23 59/10 90/2 95/17</p> <p>occur [9] 76/12 110/2 113/19 122/20 122/21 122/24 123/3 123/4 123/15</p> <p>occurred [6] 50/23 61/12 67/25 103/12 116/22 117/2</p> <p>occurs [3] 76/10 103/17 122/19</p> <p>October [2] 8/19 12/15</p> <p>October 29th [1] 12/15</p> <p>off [5] 25/13 28/17 46/2 99/7 115/15</p> <p>offense [21] 57/13 61/9 62/9 62/24 63/3 63/15 63/15 64/6 76/1 86/25 87/12 87/15 99/2 108/22 108/24 109/1 109/2 109/2 109/5 109/7 113/21</p> <p>offenses [1] 114/3</p> <p>offered [1] 10/1</p> <p>office [3] 9/19 50/9 71/7</p> <p>OFFICES [2] 2/13 3/17</p> <p>official [3] 13/15 129/22 138/18</p> <p>officials [3] 60/22 69/9 69/19</p> <p>often [2] 71/16 112/16</p> <p>oh [10] 18/22 21/19 28/25 36/17 55/18 103/10 106/24 131/6 131/17 135/25</p> <p>okay [31] 3/6 4/14 17/19 31/22 32/21 33/8 33/14 41/13 43/2 43/5 44/21 45/17 45/25 47/12 52/11 53/17 55/4 56/17 81/11 82/12 83/11 94/20 99/9 100/1 100/2 103/10 105/5 105/12 113/22 127/2</p>	<p>136/12</p> <p>okay, [1] 107/4</p> <p>okay, if [1] 107/4</p> <p>ombudsman [6] 9/12 9/17 70/24 71/2 127/14 127/15</p> <p>ombudsman's [1] 71/7</p> <p>omissions [1] 14/9</p> <p>on [221]</p> <p>on board [1] 13/9</p> <p>on that [1] 127/11</p> <p>once [6] 13/10 15/20 29/15 33/2 33/17 128/3</p> <p>one [46] 7/17 10/16 16/1 16/25 19/9 20/16 24/14 25/9 25/21 39/23 46/1 49/24 50/16 50/18 50/18 54/18 60/7 62/6 62/23 65/22 67/1 71/23 76/20 85/4 86/19 87/2 90/9 92/2 94/1 102/25 105/5 109/13 111/25 111/25 112/11 112/13 113/5 116/14 120/5 120/18 121/14 123/8 127/13 131/5 131/13 133/15</p> <p>onerous [1] 77/3</p> <p>ones [4] 36/18 108/6 114/11 116/2</p> <p>ongoing [1] 38/19</p> <p>only [22] 14/24 21/23 31/13 32/13 50/12 60/2 60/6 63/22 67/1 80/10 92/22 95/6 95/7 112/20 114/2 116/21 116/22 125/6 125/7 127/15 131/10 135/5</p> <p>onto [1] 29/18</p> <p>oOo [1] 3/3</p> <p>open [6] 30/12 30/17 31/23 33/11 76/11 122/20</p> <p>opened [2] 38/8 129/16</p> <p>opens [1] 127/17</p> <p>operating [2] 45/20 67/1</p> <p>Operations [1] 12/24</p>
<p>O</p> <p>O'CONNOR [1] 1/14</p> <p>oath [2] 24/19 53/14</p> <p>object [1] 75/2</p> <p>objecting [3] 78/24 103/19 130/22</p> <p>objection [1] 51/9</p> <p>objections [2] 39/22 46/25</p> <p>obligated [3] 18/24 40/16 54/10</p> <p>obligation [7] 18/14 22/2 22/7 23/17 36/5 59/4 127/25</p> <p>obligations [6] 73/7 73/8 73/10 77/1 77/3 120/13</p> <p>obliquely [1] 105/2</p> <p>obscured [1] 7/18</p> <p>observation [1] 83/10</p> <p>obstructing [1] 14/3</p> <p>obviously [13] 6/1 8/7</p>		

<p>O</p> <p>operator [1] 118/18</p> <p>operators [1] 118/17</p> <p>opinion [16] 43/20 43/22 43/24 44/2 44/8 44/12 46/10 48/23 49/10 49/11 78/9 91/20 92/22 110/23 112/25 113/1</p> <p>opinions [3] 78/15 81/23 103/4</p> <p>opportunity [20] 16/20 19/17 19/18 19/20 20/13 25/12 34/18 46/12 46/14 49/19 50/6 50/14 56/14 73/1 91/19 129/5 134/13 134/19 136/8 136/9</p> <p>oppose [1] 36/6</p> <p>opposed [2] 66/20 126/24</p> <p>option [1] 18/8</p> <p>or [135] 5/12 6/5 7/21 10/8 10/9 11/17 12/21 14/24 16/11 17/11 21/8 22/25 24/8 24/22 26/2 26/8 26/9 29/8 30/19 31/3 35/5 39/10 39/10 39/17 39/18 40/14 40/25 41/4 41/5 41/8 42/13 44/14 47/6 48/7 50/18 52/16 52/20 52/21 54/1 54/21 54/25 57/15 57/15 58/23 60/19 61/21 61/23 62/7 62/25 63/2 64/25 65/2 68/17 69/14 70/12 70/13 70/17 70/21 72/20 72/21 72/21 73/1 73/15 73/16 73/16 74/17 74/19 75/3 75/6 76/4 76/7 76/19 77/11 77/21 78/12 79/2 79/5 79/6 79/17 79/18 80/1 80/3 80/17 82/7 82/24 83/15 83/25 86/7 86/14 86/25 87/3 88/7</p>	<p>89/9 89/23 90/21 92/23 92/25 93/20 93/18 96/4 96/5 97/18 97/19 98/8 99/3 99/25 102/15 103/2 103/3 103/17 103/23 104/4 104/25 106/2 106/8 106/15 106/15 109/24 110/24 111/25 112/17 114/3 115/6 116/22 119/7 119/24 120/5 120/8 123/22 124/1 128/9 130/11 132/9 134/18 138/9</p> <p>order [31] 22/6 23/20 36/10 41/16 41/17 44/17 45/10 48/6 48/17 64/23 71/10 73/19 77/25 78/10 79/1 79/6 101/17 101/19 101/22 102/14 102/14 102/17 109/17 110/1 110/8 112/3 121/22 124/5 124/6 127/9 136/20</p> <p>ordered [5] 36/12 111/6 112/24 113/7 122/6</p> <p>ordering [2] 130/11 130/23</p> <p>ordinarily [2] 24/17 24/23</p> <p>ordinary [2] 34/16 45/23</p> <p>organization [3] 92/11 92/13 94/6</p> <p>originally [3] 105/6 118/5 120/24</p> <p>other [62] 5/13 8/4 8/18 11/23 15/12 16/6 21/17 29/8 30/9 32/19 32/25 33/23 34/17 37/8 38/17 46/3 46/18 50/21 55/17 57/15 57/25 59/14 61/19 61/23 65/22 66/2 66/17 69/22 71/1 77/9 77/9 77/15 77/20 77/21 91/11 94/5 95/6 95/7 95/11 95/17 95/17 96/5 97/13 98/19 99/16 101/25 102/8 103/23 107/16 111/14</p>	<p>114/11 114/19 115/23 115/23 117/7 118/19 119/16 121/6 122/17 125/4 125/17 131/6</p> <p>others [8] 10/21 37/25 45/22 55/6 61/10 67/17 71/8 90/25</p> <p>otherwise [3] 55/19 78/18 79/5</p> <p>ought [1] 98/9</p> <p>our [85] 4/21 5/14 6/1 6/24 7/7 8/2 8/9 9/3 9/14 10/20 12/12 15/22 16/5 16/9 16/24 18/6 18/8 21/1 21/2 21/4 21/10 21/18 23/15 24/1 24/1 24/4 26/17 27/11 27/12 27/14 29/21 29/23 29/25 30/16 34/3 34/19 37/4 37/6 38/2 38/8 38/15 39/2 46/11 48/23 49/2 50/2 53/2 56/10 56/12 57/9 58/25 59/14 65/10 67/5 68/3 69/12 69/13 72/1 76/15 77/14 77/17 79/1 80/3 80/4 80/20 83/18 83/18 83/22 84/4 84/9 89/16 99/20 101/16 102/22 103/25 104/13 105/2 107/23 107/24 122/16 130/14 130/16 133/24 134/5 136/10</p> <p>out [36] 8/13 10/4 11/16 14/6 15/23 17/13 17/23 21/7 23/15 23/21 27/12 30/20 32/21 32/24 35/25 36/8 37/21 40/15 42/5 42/7 42/14 46/21 67/17 67/18 67/22 69/12 69/25 71/8 73/21 84/9 89/6 100/20 104/18 125/16 131/6 136/20</p>
---	--	--

<p>O</p> <p>outcome [11] 8/15 10/24 46/17 47/8 48/25 52/10 64/3 64/6 67/20 69/15 89/13</p> <p>outcomes [1] 115/5</p> <p>outlining [1] 15/12</p> <p>outside [7] 42/8 80/14 91/25 95/5 98/16 103/25 106/8</p> <p>outskirts [1] 13/8</p> <p>over [17] 5/1 12/16 23/5 23/25 25/23 28/22 53/9 57/6 61/3 71/23 74/4 74/9 90/21 105/19 108/12 109/20 118/16</p> <p>overall [1] 93/5</p> <p>overlook [1] 4/7</p> <p>overstate [1] 53/2</p> <p>overturn [1] 114/14</p> <p>overturned [4] 114/13 115/6 119/21 122/7</p> <p>own [2] 31/19 34/3</p>	<p>parallel [1] 110/10</p> <p>parameters [1] 95/5</p> <p>paramilitary [2] 92/11 92/12</p> <p>part [15] 22/11 26/8 34/13 41/16 44/4 44/5 63/17 64/17 81/8 82/9 90/5 90/12 105/1 120/11 122/7</p> <p>participants [3] 60/4 60/6 138/9</p> <p>participate [1] 125/24</p> <p>participation [3] 124/14 124/16 125/3</p> <p>particular [6] 12/14 12/14 23/24 31/2 86/1 131/15</p> <p>particularly [1] 21/25</p> <p>parties [9] 41/14 45/16 55/2 73/18 75/7 77/9 120/3 127/10 130/18</p> <p>parties' [1] 16/9</p> <p>parts [2] 24/7 44/4</p> <p>party [2] 67/14 120/5</p> <p>party's [1] 87/11</p> <p>passages [1] 30/25</p> <p>passed [3] 5/22 51/12 113/8</p> <p>passengers [7] 12/8 12/17 13/4 13/9 13/21 14/20 130/1</p> <p>past [1] 61/3</p> <p>path [1] 130/10</p> <p>patience [2] 21/2 29/23</p> <p>PATRICK [2] 2/19 4/18</p> <p>pattern [3] 43/13 94/9 106/24</p> <p>PAUL [3] 2/3 3/10 4/7</p> <p>pay [2] 40/16 85/13</p> <p>payment [1] 104/24</p> <p>payments [11] 73/10 73/12 73/15 73/16 73/18 73/24 74/1 74/2 77/4 104/25 120/16</p>	<p>pen [1] 128/3</p> <p>pending [1] 80/21</p> <p>Pennsylvania [1] 2/20</p> <p>people [11] 15/19 16/22 17/16 25/4 94/8 100/7 103/15 130/7 132/3 132/23 134/8</p> <p>performance [1] 120/14</p> <p>performed [4] 120/12 120/13 120/21 120/25</p> <p>perhaps [5] 22/14 26/7 50/2 109/8 109/9</p> <p>period [5] 45/16 82/6 84/1 94/25 99/19</p> <p>permission [3] 3/21 21/3 24/4</p> <p>permit [2] 32/17 106/10</p> <p>permitted [1] 55/4</p> <p>permitting [1] 91/25</p> <p>persisted [1] 52/19</p> <p>person [5] 7/5 62/7 63/2 63/14 66/7</p> <p>personnel [1] 104/10</p> <p>persons [6] 63/2 66/21 73/16 99/21 104/21 104/22</p> <p>perspective [1] 99/21</p> <p>persuasive [1] 114/5</p> <p>Peter [1] 29/4</p> <p>Petroleum [2] 47/25 48/1</p> <p>PHILLIPS [1] 2/23</p> <p>physical [1] 14/23</p> <p>picture [1] 17/9</p> <p>piece [3] 8/25 41/18 118/25</p> <p>pieces [2] 24/6 36/22</p> <p>pilot [3] 60/10 60/12 89/5</p> <p>pilots [3] 85/17 86/10 118/22</p> <p>Pipeline [1] 16/18</p> <p>place [9] 12/14 13/7 66/3 73/19 75/14 90/3 101/13 125/4 125/7</p>
<p>P</p> <p>P.C [1] 2/13</p> <p>page [6] 15/22 46/9 48/23 86/22 87/2 128/17</p> <p>pages [6] 21/16 81/22 81/23 89/15 119/12 130/16</p> <p>paid [1] 39/18</p> <p>pandemic [1] 138/8</p> <p>pandering [1] 51/20</p> <p>panel [1] 38/16</p> <p>paper [1] 128/4</p> <p>papers [9] 6/2 7/7 7/20 8/9 9/3 9/12 10/20 16/24 124/10</p> <p>paragraph [4] 14/15 46/20 68/22 69/9</p> <p>paragraphs [3] 67/22 88/23 97/17</p>		

<p>P</p> <p>placed [2] 15/4 34/12</p> <p>plain [1] 30/15</p> <p>plan [2] 107/13 127/9</p> <p>plane [4] 67/11 86/11 89/2 91/5</p> <p>planes [2] 57/21 130/25</p> <p>play [2] 54/5 129/22</p> <p>played [7] 85/11 94/19 117/13 129/20 129/23 130/2 130/6</p> <p>playing [1] 85/15</p> <p>plea [45] 11/8 28/10 28/16 29/8 37/1 39/8 39/9 39/11 39/19 40/24 42/4 46/14 46/25 47/19 47/20 47/24 48/17 49/4 49/6 49/9 54/21 54/24 72/20 75/8 75/14 99/1 109/25 110/9 110/15 110/19 111/2 111/9 111/13 111/15 111/17 111/22 114/18 114/24 116/8 116/10 120/1 121/10 126/1 126/3 126/4</p> <p>plead [1] 54/25</p> <p>pleading [1] 129/24</p> <p>pleas [1] 111/19</p> <p>Please [1] 3/4</p> <p>pleased [2] 20/18 25/17</p> <p>plummet [1] 89/3</p> <p>point [53] 7/17 11/25 12/20 12/22 13/3 13/6 13/19 19/9 21/22 22/10 22/21 23/11 24/11 27/16 30/15 31/5 31/10 33/3 33/4 37/18 39/1 40/4 40/6 45/4 49/24 50/21 67/17 67/18 76/21 81/13 81/14 82/3 83/11 84/11 84/20 87/17 93/11 106/24 107/19 108/21 111/14 112/6 119/3 121/4 121/14 124/13 125/8</p>	<p>127/23 127/24 128/6 128/21 129/1 136/6</p> <p>pointed [1] 87/4</p> <p>points [7] 7/20 17/18 23/24 23/25 121/1 121/2 132/21</p> <p>police [1] 87/10</p> <p>policies [1] 59/15</p> <p>policy [2] 11/6 102/11</p> <p>portion [1] 61/18</p> <p>portions [3] 119/7 119/13 120/4</p> <p>position [16] 15/4 21/23 23/4 29/1 29/12 30/16 31/14 31/21 31/21 32/11 60/25 61/2 120/19 120/24 130/15 134/25</p> <p>possess [2] 17/25 17/25</p> <p>possibilities [1] 20/22</p> <p>possibility [1] 54/16</p> <p>possible [3] 5/7 115/5 121/3</p> <p>possibly [2] 23/10 133/6</p> <p>posture [4] 27/23 28/7 47/13 51/1</p> <p>potential [4] 58/2 59/23 69/1 132/21</p> <p>potentially [6] 10/24 63/5 111/5 115/9 119/16 136/9</p> <p>power [12] 16/15 22/6 24/5 25/9 28/21 29/18 34/1 47/9 74/23 105/6 135/17 136/5</p> <p>powers [1] 5/18</p> <p>practice [1] 72/24</p> <p>practices [1] 59/16</p> <p>precede [1] 111/20</p> <p>precedent [14] 28/9 39/5 39/6 44/25 44/25 50/19 50/20 53/19 55/21 73/22 79/4 79/5 106/23 136/1</p> <p>precedes [1] 52/8</p>	<p>preceding [5] 67/7 86/6 86/7 88/9 91/4</p> <p>precepts [1] 21/24</p> <p>precise [1] 24/23</p> <p>precisely [3] 68/13 68/13 83/6</p> <p>precluded [2] 11/18 53/5</p> <p>precludes [1] 11/22</p> <p>prelude [2] 20/2 36/23</p> <p>premise [5] 21/11 28/18 28/20 30/2 62/16</p> <p>preplea [4] 110/8 111/5 111/10 112/8</p> <p>preponderance [4] 8/1 8/5 63/5 132/9</p> <p>prescribed [1] 138/13</p> <p>present [6] 12/13 28/24 32/14 45/2 46/12 46/24</p> <p>presentation [3] 20/11 127/10 133/25</p> <p>presented [3] 50/3 54/16 115/12</p> <p>presents [1] 64/10</p> <p>presiding [1] 122/22</p> <p>press [3] 14/6 14/8 40/15</p> <p>presumably [3] 41/16 125/9 135/15</p> <p>presume [1] 126/16</p> <p>pretrial [1] 7/24</p> <p>pretty [1] 109/13</p> <p>prevent [2] 99/24 100/2</p> <p>prevented [1] 53/9</p> <p>preventing [1] 56/13</p> <p>previously [1] 95/6</p> <p>principal [1] 119/11</p> <p>principle [3] 79/20 128/3 128/3</p> <p>principles [1] 29/17</p> <p>printout [1] 81/22</p> <p>prior [3] 67/8 83/15 109/25</p> <p>private [3] 34/3 113/14</p>
--	---	---

<p>P</p> <p>private... [1] 114/7</p> <p>privilege [1] 37/1</p> <p>probably [2] 16/10 42/11</p> <p>problem [6] 74/19 79/16 79/19 81/17 83/10 86/11</p> <p>problematic [2] 41/12 89/18</p> <p>problems [3] 51/4 85/23 95/19</p> <p>procedural [5] 7/17 39/23 40/4 41/18 44/4</p> <p>procedurally [1] 126/2</p> <p>procedure [3] 30/11 122/14 122/15</p> <p>proceed [2] 17/9 107/19</p> <p>proceeding [3] 65/12 84/21 125/7</p> <p>proceedings [18] 25/11 38/6 45/11 77/22 77/24 112/4 112/23 113/2 115/15 122/18 122/23 125/4 126/7 126/25 129/9 137/1 138/6 138/10</p> <p>process [12] 11/8 26/1 26/10 34/14 67/15 80/7 87/24 88/2 88/19 102/23 105/1 127/19</p> <p>produce [1] 36/14</p> <p>produced [2] 12/8 48/23</p> <p>product [4] 66/25 90/24 90/25 91/1</p> <p>Products [2] 64/8 64/8</p> <p>Professor [2] 29/3 37/19</p> <p>professor's [1] 135/11</p> <p>proffer [1] 15/22</p> <p>profoundly [1] 108/3</p> <p>program [1] 120/17</p> <p>prohibited [1] 96/3</p> <p>PROJECT [1] 2/4</p> <p>promise [3] 6/12 53/22 106/10</p>	<p>promised [3] 20/12 134/13 135/8</p> <p>promises [1] 50/6</p> <p>promulgate [1] 104/10</p> <p>prongs [1] 46/6</p> <p>proof [5] 7/19 7/21 7/25 8/5 64/10</p> <p>proper [2] 91/9 91/12</p> <p>properly [3] 19/24 42/19 56/10</p> <p>property [1] 87/11</p> <p>proposed [2] 110/9 129/6</p> <p>proposition [5] 19/10 25/5 63/19 72/17 116/15</p> <p>prosecutable [1] 69/4</p> <p>prosecute [8] 20/7 20/14 52/22 53/7 98/10 98/10 128/5 128/11</p> <p>prosecuted [2] 19/3 56/5</p> <p>prosecuting [2] 11/22 53/5</p> <p>prosecution [22] 6/5 10/11 10/19 10/23 10/25 11/15 11/18 24/25 36/23 52/2 53/10 60/2 62/4 62/21 72/13 72/17 75/18 80/11 111/25 112/2 126/10 134/18</p> <p>prosecutor [3] 53/7 108/16 114/2</p> <p>prosecutor's [2] 50/9 126/23</p> <p>prosecutorial [4] 58/7 70/20 79/22 113/19</p> <p>prosecutors [15] 19/7 19/18 20/9 20/14 22/15 27/24 28/4 47/5 48/19 50/15 55/16 58/4 60/22 100/25 134/19</p> <p>prospective [6] 18/1 18/12 83/6 102/5 102/7 124/19</p> <p>prospectively [3] 124/14 124/16 124/20</p> <p>protect [2] 23/3 50/12</p>	<p>protected [5] 18/10 22/8 24/24 33/25 47/1</p> <p>protection [1] 46/3</p> <p>protections [2] 7/9 22/12</p> <p>proud [1] 29/5</p> <p>prove [14] 15/14 15/23 16/7 16/20 21/18 21/21 22/21 43/10 59/24 62/2 80/5 88/9 93/19 132/8</p> <p>proved [2] 58/8 79/17</p> <p>proven [1] 63/5</p> <p>provide [6] 10/18 48/2 78/11 78/22 102/18 103/4</p> <p>provided [12] 16/4 59/7 61/22 71/9 71/13 71/19 71/20 87/2 87/21 92/18 95/18 104/1</p> <p>provides [2] 18/11 105/9</p> <p>providing [3] 65/1 79/12 102/20</p> <p>provision [32] 10/17 10/21 18/16 18/17 22/9 24/12 24/20 26/6 26/17 27/13 27/14 37/24 40/8 40/14 45/12 45/23 52/25 53/3 53/4 53/11 53/20 55/24 56/2 56/3 65/4 73/20 104/5 104/13 104/14 106/1 134/17 134/18</p> <p>provisions [20] 10/16 19/5 19/25 39/8 40/3 40/7 41/6 41/8 41/12 50/13 54/12 54/18 56/13 81/1 83/3 103/23 104/11 119/16 119/16 119/18</p> <p>proximate [25] 16/20 62/6 63/11 63/16 63/23 64/1 64/4 64/9 64/11 64/15 64/23 86/3 88/8 89/9 89/10 89/10 89/12 91/6 93/16 93/24 94/3 95/25 109/7 132/11 132/13</p>
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<p>P proximately [6] 7/6 57/12 62/8 63/2 86/24 87/1 prudential [4] 43/12 103/3 103/19 124/24 prudentially [1] 123/11 public [8] 14/12 26/2 30/9 33/25 76/22 76/23 122/4 122/6 publicly [3] 26/10 60/8 60/18 published [2] 29/5 35/19 purpose [2] 48/12 55/14 purposes [1] 39/9 pursuant [2] 26/20 26/23 purview [1] 42/8 push [1] 115/15 pushed [1] 89/2 pushing [2] 53/11 128/8 put [19] 24/16 24/18 25/12 29/18 33/24 42/1 51/20 55/5 56/3 84/10 97/18 104/7 110/20 113/4 113/5 120/19 120/23 128/3 132/8 putting [3] 53/14 55/6 130/17</p>	<p>questions [19] 34/22 40/10 40/20 40/24 69/23 70/2 71/24 80/22 80/23 107/16 107/18 108/23 109/13 115/3 115/23 116/12 117/11 119/5 129/16 quickly [2] 109/12 121/3 QUINNEY [1] 2/3 quite [6] 30/19 42/23 46/18 81/19 94/14 127/24 quo [2] 103/12 123/18 quote [2] 23/7 52/18</p> <hr/> <p>R raised [5] 91/2 98/7 121/4 122/1 124/18 ran [1] 110/21 Rather [1] 65/19 ratified [1] 50/24 RDR [2] 138/4 138/17 re [76] 11/1 11/2 35/7 35/22 37/8 38/19 38/22 39/3 43/7 43/8 46/19 47/15 49/15 49/16 50/16 62/15 62/22 65/6 65/10 65/11 70/2 70/2 70/3 70/5 72/20 78/19 79/11 79/23 79/23 80/1 80/13 81/6 81/6 81/8 81/18 81/23 82/10 84/15 86/18 91/16 91/20 100/23 109/14 109/15 109/16 109/18 109/19 109/23 111/12 111/17 112/5 112/6 112/18 112/20 113/17 113/25 114/4 117/7 121/5 121/9 121/11 123/10 124/1 124/14 124/23 125/11 125/15 125/23 128/14 128/15 128/16 128/17 128/20 128/25 129/1 129/8 reach [4] 12/3 16/3 81/21 88/17</p>	<p>reached [6] 47/19 47/24 47/25 54/14 71/8 75/6 reaches [2] 23/19 47/20 reaching [3] 24/19 38/17 104/18 read [17] 9/8 30/19 35/21 35/21 43/17 43/20 44/7 44/11 44/11 44/20 79/11 91/19 92/22 98/6 109/22 112/13 113/16 reading [3] 9/12 46/19 112/12 ready [2] 15/16 130/15 real [3] 81/17 82/22 115/12 realize [2] 98/20 102/10 really [27] 6/7 15/10 21/20 25/22 42/22 51/2 52/4 55/3 55/13 65/3 79/9 80/9 82/1 83/20 107/1 107/14 109/11 110/5 114/5 114/7 116/4 119/25 120/9 127/23 128/8 131/18 131/24 reason [15] 11/5 16/5 17/23 34/20 42/5 66/10 75/3 84/25 94/17 95/22 95/23 105/22 124/3 127/18 135/12 reasonable [11] 7/20 27/7 50/6 50/7 53/17 58/9 59/25 62/2 80/5 93/20 114/3 reasonableness [1] 31/5 reasonably [2] 9/1 13/19 reasoning [5] 113/17 114/5 114/8 124/1 124/1 reasons [17] 20/23 41/7 45/8 46/16 54/7 57/9 60/14 71/17 72/23 80/19 94/1 101/5 113/25 123/4 132/2 133/10 134/22</p>
<p>Q quality [1] 52/8 quantities [1] 94/7 question [41] 17/16 26/13 27/2 27/9 31/13 34/25 43/6 49/25 52/11 52/13 53/22 54/14 65/8 65/10 68/17 73/11 81/12 82/20 82/22 84/3 86/18 92/21 93/4 93/7 94/2 96/3 96/23 98/4 99/5 102/6 102/25 103/22 105/5 106/10 107/4 123/8 127/22 132/15 133/4 133/5 135/5</p>		

<p>R reassigned [1] 39/15 reassignment [1] 45/4 rebuttal [1] 127/4 recalcitrant [1] 22/15 recall [3] 45/15 46/19 127/14 recent [1] 78/15 recently [2] 8/18 53/23 reckless [1] 127/20 recognize [2] 72/9 72/12 recognizes [1] 56/20 recollection [1] 49/2 record [3] 15/6 15/23 138/6 red [3] 41/5 119/9 119/17 redacted [1] 26/9 redressability [1] 113/3 REED [1] 1/14 reengaged [1] 67/5 refer [2] 21/6 27/6 reference [3] 99/16 117/12 131/23 referenced [16] 64/7 65/20 67/8 73/23 77/5 78/1 78/14 80/6 80/19 86/4 95/8 103/24 104/19 105/2 116/7 116/14 referent [1] 27/7 referred [2] 7/19 95/11 referring [3] 6/1 27/3 126/19 refers [1] 27/8 refined [1] 50/2 reflect [1] 136/19 reflected [4] 62/25 88/6 108/16 109/3 regain [1] 12/21 regard [7] 13/20 66/12 69/20 71/22 99/22 128/16 136/14 regarded [1] 31/16</p>	<p>regrets [1] 108/3 regular [1] 120/17 regularly [1] 69/12 regulators [7] 14/5 57/24 66/22 66/23 89/22 90/21 132/17 Reilly [1] 29/4 reinforcing [1] 16/1 reiterate [2] 60/5 95/16 reject [14] 28/10 29/7 29/8 36/5 39/8 41/6 41/8 41/9 41/10 41/11 75/4 105/6 105/22 135/3 rejected [1] 54/17 rejecting [4] 39/11 40/20 42/25 46/10 rejects [1] 37/2 relate [1] 65/25 related [17] 5/14 21/4 35/15 57/22 57/25 66/19 66/24 67/7 67/12 67/13 67/15 69/10 85/21 93/13 96/5 97/10 99/25 relates [11] 49/14 54/5 62/6 77/10 85/8 88/23 91/23 96/24 102/11 102/12 123/10 relation [1] 106/14 relationship [3] 67/19 88/1 88/1 relatively [3] 61/9 90/14 100/17 release [13] 14/6 14/8 30/1 32/22 33/18 33/22 34/10 40/15 68/24 76/8 76/19 76/20 119/15 relevant [3] 21/12 26/17 27/5 reliable [1] 58/2 reliance [1] 67/3 relied [1] 114/11 relief [7] 43/8 43/10</p>	<p>48/15 109/19 112/7 112/24 119/9 rely [4] 14/13 27/4 28/19 116/15 remaining [1] 31/13 remains [1] 60/25 remand [8] 44/6 44/8 48/21 49/1 49/12 109/22 110/8 110/22 remarkably [1] 21/14 remedies [16] 20/16 20/21 37/13 37/13 53/24 58/22 78/14 78/17 78/18 78/20 103/2 103/5 103/7 103/21 104/2 129/6 remedy [18] 12/3 17/20 19/4 36/15 36/16 36/17 36/21 103/14 104/3 104/13 104/14 110/2 111/6 111/13 119/13 120/22 133/14 134/15 remember [7] 39/22 48/22 50/17 95/14 127/12 129/12 131/18 remembers [1] 89/22 remote [3] 88/5 88/5 106/22 remoteness [6] 65/25 68/6 90/7 94/4 95/21 106/23 remove [2] 17/14 19/5 reopen [9] 54/21 54/23 54/24 108/19 114/15 119/6 120/7 120/23 124/15 reopening [2] 54/12 55/4 repeat [1] 107/24 repeatedly [1] 28/15 reply [1] 119/11 report [11] 13/15 65/21 65/22 65/23 67/9 90/18 90/19 117/25 118/2 118/4 122/2 reported [1] 86/11</p>
--	---	---

<p>R</p> <p>Reporter [1] 138/18</p> <p>REPORTER'S [1] 138/2</p> <p>reporting [2] 77/4 120/17</p> <p>reports [7] 15/25 25/23 68/1 68/5 86/5 89/14 122/6</p> <p>represent [6] 11/24 15/7 67/23 86/15 128/12 130/13</p> <p>representations [1] 10/4</p> <p>representatives [4] 56/21 71/1 71/10 108/1</p> <p>represented [1] 125/20</p> <p>representing [5] 6/8 7/3 7/4 20/24 133/11</p> <p>reputation [1] 52/7</p> <p>request [5] 16/9 47/22 80/21 83/23 101/4</p> <p>requested [3] 79/6 109/19 112/7</p> <p>requests [2] 79/9 81/9</p> <p>require [6] 14/23 17/11 40/2 81/1 118/2 118/9</p> <p>required [14] 17/2 50/20 74/7 83/4 84/11 84/14 84/21 113/3 117/1 118/4 118/7 118/10 122/19 132/25</p> <p>requirement [1] 100/25</p> <p>requirements [3] 63/12 77/4 85/16</p> <p>requires [5] 29/19 30/24 82/2 83/17 124/4</p> <p>requiring [2] 10/17 23/21</p> <p>requisite [1] 93/5</p> <p>research [2] 116/8 119/19</p> <p>reserves [1] 108/15</p> <p>resolution [2] 114/25 127/23</p> <p>resolved [1] 9/15</p> <p>respect [54] 38/1 57/1 57/16 59/8 59/20 60/14 60/20 61/8 61/16 61/24</p>	<p>62/1 64/13 65/21 66/3 66/17 66/23 68/6 68/16 69/13 69/17 69/22 70/16 73/24 73/25 74/3 74/8 75/14 76/6 76/23 77/8 78/10 78/20 79/1 90/7 90/8 90/22 94/24 97/9 97/25 99/12 99/14 99/17 100/17 103/21 104/3 110/10 111/15 111/16 112/11 112/12 114/10 117/25 131/8 136/10</p> <p>respected [2] 54/9 54/10</p> <p>respectfully [12] 76/8 80/18 80/20 81/4 81/20 101/4 106/16 106/19 107/5 119/11 120/22 124/17</p> <p>respective [1] 118/23</p> <p>respond [3] 84/8 99/7 99/7</p> <p>responded [1] 129/15</p> <p>responding [1] 122/12</p> <p>responds [1] 123/5</p> <p>response [7] 16/9 27/13 65/8 71/10 71/19 71/20 79/13</p> <p>responsible [2] 66/8 134/8</p> <p>rest [2] 24/21 26/9</p> <p>rested [1] 28/8</p> <p>restitution [2] 73/15 87/6</p> <p>restoring [1] 103/11</p> <p>restructure [1] 5/23</p> <p>rests [3] 21/11 30/2 70/21</p> <p>result [5] 7/6 11/10 14/16 62/8 63/3</p> <p>resulted [2] 118/23 132/15</p> <p>resume [1] 93/9</p> <p>retrospective [1] 18/13</p> <p>reversed [4] 39/14 39/14 42/6 93/1</p> <p>review [5] 29/5 29/18 29/19 35/18 45/24</p> <p>reviewed [4] 98/8 107/11</p>	<p>107/12 136/16</p> <p>revisions [1] 59/15</p> <p>revolving [1] 5/13</p> <p>Richmond [1] 2/18</p> <p>Riffel [1] 4/5</p> <p>rigged [1] 88/19</p> <p>right [87] 3/5 4/11 4/25 5/10 5/19 6/3 6/4 6/6 8/10 11/7 13/24 16/17 18/5 18/7 19/1 19/9 21/5 25/3 26/13 29/4 30/10 33/4 34/9 35/8 38/23 41/19 41/19 42/11 42/21 44/9 44/16 45/15 47/4 48/14 49/3 49/7 49/13 49/18 49/25 50/7 50/8 50/12 50/15 51/5 51/5 51/10 51/13 51/24 51/24 52/3 54/3 54/9 55/11 56/10 78/12 81/16 85/3 85/25 88/14 88/21 92/8 96/10 96/22 96/25 97/12 98/4 103/20 105/3 108/13 108/18 108/19 110/9 111/22 113/14 114/7 115/5 121/9 121/17 121/19 124/8 126/2 127/8 127/8 129/4 134/5 136/1 136/25</p> <p>rights [43] 5/12 5/20 5/21 5/22 5/24 5/25 6/9 7/10 9/11 9/17 10/15 10/17 11/11 14/22 18/11 18/19 18/25 20/3 20/4 22/4 22/8 22/11 22/17 23/3 24/2 35/4 36/24 46/22 47/1 47/3 48/17 54/8 55/13 55/16 56/1 56/4 71/7 79/14 111/21 121/5 123/13 126/6 135/9</p> <p>risk [13] 12/7 12/8 12/12 13/4 13/5 13/21 13/22 14/21 129/13 129/14</p>
---	--	---

<p>R risk... [3] 129/25 130/7 130/7 riskier [1] 15/4 risks [1] 15/2 RMR [2] 138/4 138/17 road [2] 81/13 124/12 robbery [4] 87/3 87/4 87/8 87/9 role [14] 57/23 60/12 66/23 80/10 85/11 85/15 94/19 111/15 117/13 129/20 129/22 129/24 130/2 130/6 Room [1] 138/20 Rosenthal [16] 44/6 45/4 46/9 46/10 46/15 47/3 48/6 48/16 48/21 49/1 103/18 109/22 110/14 110/18 110/22 110/23 Rosenthal's [3] 43/22 48/24 50/17 route [1] 120/6 routinely [2] 33/23 122/17 rubbing [1] 79/21 rule [38] 12/11 14/19 15/6 15/13 16/5 18/3 22/24 27/7 29/21 30/15 30/23 31/3 31/4 31/7 31/14 31/18 31/24 31/24 32/4 32/10 32/15 32/17 45/14 51/7 51/15 51/18 55/9 75/12 76/9 122/19 123/20 123/22 123/23 124/4 124/10 124/11 125/8 133/6 Rule 10 [7] 30/23 31/3 31/14 32/10 32/15 51/18 122/19 Rule 11 [3] 51/7 51/15 75/12 Rule 2 [1] 31/7 Rule 23 [1] 32/4</p>	<p>Rule 41 [6] 123/20 123/22 123/23 124/4 124/11 125/8 ruled [3] 32/8 36/20 114/22 rules [13] 6/24 30/11 31/8 32/1 32/4 32/19 34/4 34/6 34/17 37/6 58/3 62/20 104/10 ruling [4] 12/3 84/24 116/1 123/14 rulings [2] 16/16 65/13 rummage [1] 23/23 running [1] 100/19 runs [2] 65/3 119/14</p> <hr/> <p>S safely [1] 130/25 safety [4] 14/5 14/11 61/18 132/17 saga [1] 35/17 said [69] 9/4 9/12 9/16 11/5 12/2 16/23 17/7 19/16 19/21 20/1 27/23 28/9 32/9 34/3 35/12 36/7 36/9 38/22 44/10 46/15 50/1 50/5 52/20 52/25 53/16 55/7 64/9 74/4 74/22 75/10 75/15 76/15 78/16 79/11 79/14 80/13 82/5 84/3 88/4 88/16 88/17 89/11 91/16 92/17 93/4 93/20 102/10 104/7 105/6 109/21 109/23 110/13 110/25 111/4 113/2 113/5 113/25 116/17 116/18 119/8 119/9 119/10 121/14 127/10 127/15 133/1 133/20 133/25 135/2 Salinas [4] 63/18 63/21 64/3 89/12 Salt [1] 2/5 same [16] 13/12 16/11 19/13 34/6 39/21 41/4</p>	<p>46/3 47/2 48/8 54/14 61/7 75/12 75/13 79/9 85/16 86/8 SANTOS [2] 2/16 4/20 sat [1] 125/19 satisfied [1] 120/13 satisfy [1] 46/7 saw [3] 85/13 90/13 94/11 say [71] 18/5 18/22 20/6 25/10 27/12 28/16 29/5 30/18 30/21 30/23 30/25 31/1 31/3 32/2 33/23 36/17 39/12 39/16 39/17 39/24 40/7 40/19 40/24 41/3 41/20 41/22 41/23 41/25 42/19 48/16 50/9 64/1 65/16 73/4 81/7 82/3 82/15 85/10 85/20 85/23 88/10 90/6 90/25 90/25 92/15 93/2 93/18 93/23 96/8 98/24 99/10 105/13 107/5 108/2 110/5 112/22 114/17 115/3 115/7 117/21 119/23 121/7 122/5 122/20 125/1 125/14 129/8 129/19 130/5 134/7 135/15 saying [29] 28/24 29/7 30/20 36/2 37/9 37/22 38/17 38/21 38/22 48/7 48/7 48/20 49/11 51/24 56/9 72/1 82/24 83/5 83/9 83/11 94/19 98/15 107/25 114/24 117/15 128/1 134/11 134/24 135/1 says [50] 7/5 7/13 14/1 18/18 19/2 23/6 24/13 26/19 27/18 28/1 30/12 30/15 31/7 31/17 31/20 31/24 31/24 32/5 32/12 32/16 33/8 33/14 36/4 37/1 37/11 37/18 38/3 39/3 42/18 45/7 46/20</p>
--	--	--

<p>S says... [19] 48/8 48/9 52/16 53/4 55/25 56/7 73/19 80/8 100/14 100/23 100/24 106/4 117/4 121/5 122/19 128/5 128/18 130/7 131/12 SB [1] 54/1 SB 8 [1] 54/1 Scalia [1] 27/4 Scalia/Garner [1] 27/4 scenario [2] 94/5 97/20 scenarios [3] 118/12 118/22 119/2 scheduling [1] 5/4 School [1] 29/4 scope [2] 66/11 124/18 scrutinize [2] 26/14 26/16 scrutinized [2] 25/20 26/12 scrutinizing [2] 24/12 27/20 scrutiny [1] 53/20 Sea [2] 12/16 12/20 sealed [2] 47/22 48/10 seated [2] 3/4 9/8 second [10] 6/4 21/4 21/5 24/1 40/2 70/17 74/10 112/18 119/12 122/7 second-guess [2] 40/2 70/17 secret [4] 10/10 19/14 35/25 45/8 secretly [2] 26/1 26/5 secrets [1] 26/8 Section [1] 18/15 see [20] 7/14 18/16 18/23 20/18 22/16 25/17 26/2 36/1 38/19 39/21 40/9 40/10 40/25 43/2 44/23 77/19 104/10 107/14 129/10 131/24</p>	<p>seeing [2] 40/12 135/1 seeking [4] 23/23 37/23 119/17 121/20 seem [5] 21/15 25/5 30/25 40/21 83/24 seems [5] 17/18 21/14 25/7 53/17 123/12 seen [9] 11/14 15/22 16/11 16/11 53/1 84/4 84/4 84/5 99/1 segues [1] 109/10 Senate [1] 51/11 Senator [10] 10/21 20/18 25/18 25/21 26/5 29/15 40/5 45/21 45/21 135/15 send [3] 110/14 112/8 129/9 sending [1] 25/23 sends [1] 46/8 senior [13] 24/13 24/18 39/17 40/8 52/13 52/17 52/18 52/19 53/5 53/7 53/10 53/14 60/22 sense [3] 21/25 120/9 127/1 sensitive [1] 42/15 sensor [7] 67/1 67/3 67/9 67/14 85/24 86/2 86/10 sentence [3] 16/11 24/14 54/23 sentencing [6] 39/10 54/21 63/21 111/20 111/23 126/5 separate [2] 12/5 62/10 separately [1] 107/22 separateness [1] 68/6 September [1] 37/18 series [2] 114/9 118/15 seriously [1] 104/6 service [1] 67/13 serviced [1] 86/12 Services [2] 27/21 75/15 session [2] 133/20 133/23</p>	<p>set [47] 5/8 6/25 7/9 19/25 20/1 42/1 48/18 49/5 49/9 49/16 49/22 50/13 56/12 57/1 57/9 57/19 58/13 58/16 58/25 59/14 59/19 61/5 62/4 62/11 63/19 64/12 64/19 64/20 68/14 68/22 68/25 69/12 78/18 78/20 92/20 95/6 97/8 97/9 98/17 98/21 99/11 103/7 103/22 105/16 105/22 106/6 134/17 set-aside [1] 103/22 setting [7] 36/21 39/7 54/11 103/8 135/12 135/20 135/23 seven [3] 63/9 128/17 128/17 several [5] 29/13 42/7 71/24 98/25 114/8 shackles [1] 30/3 shall [4] 18/18 22/16 33/19 73/19 sham [4] 115/11 115/15 115/17 115/19 shape [1] 10/24 she [7] 4/2 44/8 46/11 48/6 48/8 48/8 66/10 shock [1] 10/7 shockingly [1] 13/11 short [1] 127/6 shortly [1] 52/10 shotgun [1] 87/4 should [55] 9/15 12/25 17/9 19/19 20/7 20/8 21/12 24/1 24/7 24/9 24/11 25/2 26/11 27/19 27/25 28/2 34/6 34/8 34/12 39/13 39/16 39/18 42/2 42/11 51/21 51/25 51/25 58/9 58/24 65/5</p>
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<p>S should... [25] 70/11 71/3 71/12 71/13 71/14 71/19 73/4 76/24 78/16 80/17 92/17 101/10 104/6 104/14 109/24 110/5 111/4 111/5 113/12 132/25 133/10 134/15 134/17 135/6 136/13 shouldn't [3] 36/15 39/17 48/10 show [7] 19/23 68/5 73/2 83/18 106/24 131/2 134/10 shows [2] 8/7 42/2 side [2] 99/15 129/14 sides [1] 129/19 sign [4] 25/13 28/17 33/6 33/9 signature [1] 33/11 Signed [1] 138/15 significance [1] 98/21 significant [9] 33/20 77/8 87/21 91/1 134/25 135/4 135/7 135/12 135/16 siloed [1] 61/9 similar [7] 36/1 36/18 51/1 54/15 76/2 112/4 117/8 Similarly [1] 110/16 simple [5] 12/9 21/11 30/2 30/16 94/18 simply [9] 11/8 12/3 14/13 23/20 33/16 41/6 47/10 91/11 130/5 simulator [8] 61/12 67/11 67/12 95/4 118/7 118/10 118/10 130/23 single [4] 15/22 67/3 85/24 131/13 sir [2] 96/20 100/3 sit [2] 21/15 30/14 situation [5] 16/16 42/17 128/20 129/2 129/3</p>	<p>six [3] 52/5 87/5 132/20 Sixth [2] 8/3 62/15 SJ [1] 2/3 Smith [1] 44/18 smuggling [1] 63/23 so [225] solely [4] 62/24 93/17 94/2 133/22 some [73] 3/21 5/13 8/18 9/7 15/10 17/11 17/11 17/18 19/22 20/21 21/7 21/17 22/22 25/19 26/7 26/8 27/18 28/21 30/5 31/5 33/24 34/10 36/10 37/8 37/15 38/6 38/17 40/12 40/25 40/25 42/12 45/4 46/16 52/25 57/7 57/15 59/10 66/9 69/1 74/19 76/18 76/19 79/9 82/7 83/15 84/11 84/20 85/1 85/14 88/1 90/4 96/5 96/11 102/4 103/21 103/23 104/22 106/7 106/12 109/8 115/22 117/24 117/25 119/5 125/8 125/8 125/17 126/25 127/22 129/9 132/8 132/12 138/8 somebody [3] 32/20 65/1 92/13 somehow [1] 115/17 someone [4] 44/18 55/5 98/5 98/19 something [16] 10/9 22/25 25/1 26/9 31/4 41/5 43/1 89/6 97/17 105/14 106/2 106/16 108/2 129/3 135/7 135/13 son [1] 4/5 soon [1] 136/20 sorry [9] 18/22 32/8 37/19 89/1 91/17 100/19 105/18 127/7 132/20</p>	<p>sort [15] 24/5 65/1 72/17 72/25 74/19 81/1 83/6 83/7 83/7 83/10 92/12 100/16 104/20 106/12 125/10 sought [3] 58/22 79/25 80/19 sounds [2] 49/12 120/9 source [1] 31/19 Southern [1] 19/11 spaced [1] 15/22 speak [4] 65/6 65/15 71/15 123/21 speaking [1] 14/8 speaks [1] 71/14 specific [5] 39/10 78/13 100/12 104/5 113/13 specifically [18] 11/16 39/2 39/13 57/4 69/9 73/13 74/16 86/22 89/9 97/10 100/9 104/1 106/5 111/10 114/6 117/3 130/21 133/22 specifics [1] 42/17 specified [1] 49/10 specify [2] 75/5 104/2 speculative [2] 117/4 117/5 speed [2] 63/25 95/4 speedy [15] 26/15 72/11 75/17 105/7 105/19 106/1 106/4 112/3 114/21 115/3 115/7 115/9 115/14 115/20 115/22 spell [1] 11/16 spelled [1] 23/21 spent [1] 130/16 spirit [1] 125/11 split [3] 35/10 38/21 128/19 sponsor [1] 86/14 sponsored [1] 58/4 sponsoring [1] 86/5</p>
--	--	--

<p>S spring [1] 10/13 squarely [1] 51/20 staff [1] 51/11 stage [2] 74/6 112/9 stages [6] 12/4 111/22 114/19 123/15 126/7 126/12 stake [1] 7/23 stand [1] 29/10 standard [8] 7/21 7/25 8/4 11/15 32/25 33/17 45/20 57/16 standards [2] 63/6 132/14 standing [6] 30/2 72/2 72/3 76/21 113/1 113/6 stands [1] 101/14 start [4] 3/6 5/10 72/1 94/22 started [1] 101/10 starting [1] 64/17 state [2] 35/18 38/6 stated [4] 62/12 62/12 101/13 123/4 statement [24] 40/16 52/15 52/16 53/8 58/18 60/3 60/13 68/13 68/25 85/9 85/10 91/10 91/13 92/18 93/12 93/14 93/17 93/19 93/21 95/7 95/16 117/12 117/14 117/15 statements [7] 9/22 14/9 14/13 14/14 57/19 69/7 129/18 STATES [25] 1/1 1/6 1/14 1/19 1/20 4/13 9/22 56/19 56/20 57/4 59/12 59/21 60/8 60/16 62/1 63/18 64/8 65/16 70/22 70/22 73/6 78/22 78/24 101/13 138/14 status [8] 13/5 18/1 24/2 88/9 88/17 103/11 123/18</p>	<p>130/9 statute [9] 57/11 73/17 73/19 78/17 80/25 108/10 108/10 108/20 121/17 statutorily [1] 23/3 statutory [3] 27/5 53/25 124/21 stay [2] 45/11 129/9 step [4] 19/4 50/25 118/8 118/14 steps [6] 117/1 117/5 117/9 117/24 118/20 118/25 still [2] 50/10 85/5 stipulated [5] 84/5 85/9 88/23 89/4 89/17 stipulating [1] 40/25 stone [1] 15/19 stop [2] 44/7 82/17 Street [6] 1/21 2/8 2/14 2/17 2/23 138/20 strikes [1] 21/23 strong [1] 70/19 structuring [1] 132/1 struggle [1] 12/21 Stumo [1] 3/25 subject [2] 34/6 79/14 submissions [1] 78/5 submit [16] 67/5 75/20 76/2 76/8 76/20 76/24 80/18 81/4 81/20 81/25 82/11 95/3 106/16 106/19 109/18 126/17 submitted [5] 76/4 92/25 101/5 122/2 122/6 subsequent [1] 114/8 subsequently [2] 48/20 114/13 substantial [7] 67/20 73/10 90/2 105/15 106/13 106/20 107/5 substantive [1] 44/5 substantively [2] 12/24</p>	<p>40/7 subtle [1] 99/5 successfully [2] 73/3 73/4 successor [3] 98/8 98/12 98/22 such [7] 9/17 58/7 59/5 76/12 99/1 105/13 106/25 suffer [1] 57/16 suffered [3] 14/20 14/23 56/21 sufficient [2] 48/25 133/6 suggest [3] 69/2 77/25 125/13 suggested [1] 77/5 suggesting [2] 17/19 120/18 suicide [1] 37/17 Suite [3] 1/21 2/8 2/23 sum [1] 77/14 summarize [2] 35/16 122/16 summarizing [1] 95/13 summary [3] 37/5 37/7 119/3 sums [1] 87/21 superseding [1] 131/22 supervise [3] 24/8 25/3 25/10 supervised [4] 25/20 33/22 76/19 76/20 supervision [1] 74/18 supervisors [1] 60/22 supervisory [11] 5/17 24/5 25/9 71/23 74/8 74/23 115/25 116/4 116/5 135/17 136/5 Supp [1] 64/9 support [6] 40/10 68/2 69/5 109/11 119/24 119/25 supported [4] 76/3 112/17 114/3 121/18 supports [4] 109/2 109/18</p>
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<p>S supports... [2] 112/7 117/17 suppose [3] 53/17 124/20 129/24 supposed [1] 36/13 supposedly [1] 25/24 Supreme [4] 38/25 53/23 55/22 78/15 sure [17] 6/13 13/22 15/10 23/14 25/11 33/25 43/16 43/25 46/19 53/10 75/22 89/22 93/11 95/13 99/1 100/21 120/8 surely [1] 57/17 surprised [1] 101/9 surprising [1] 53/12 susceptibility [1] 67/1 system [5] 5/23 12/18 13/10 34/5 67/10</p>	<p>93/24 95/22 123/2 128/6 talked [6] 34/25 78/19 106/11 106/12 112/25 130/15 talking [7] 15/2 45/11 83/12 97/24 97/24 114/6 125/1 talks [3] 93/25 113/18 126/18 tax [1] 99/2 team [1] 30/7 technical [4] 60/12 61/23 89/1 90/1 Telephone [7] 1/22 2/6 2/9 2/12 2/18 2/21 2/24 tell [7] 13/16 30/20 34/10 55/16 125/6 130/19 130/21 telling [2] 6/21 55/10 temporally [2] 86/25 117/8 ten [1] 19/10 term [5] 15/1 53/4 53/23 89/2 117/3 terms [18] 47/13 49/8 49/15 57/11 60/17 64/14 69/15 70/18 70/20 73/3 73/21 74/16 75/5 77/12 91/8 108/13 116/5 118/17 test [1] 61/12 testimony [2] 95/9 95/14 TEXAS [11] 1/2 1/7 1/21 1/22 2/8 2/24 29/4 47/15 56/7 138/18 138/20 text [5] 56/11 89/21 108/9 108/10 108/20 textually [2] 55/23 108/12 than [18] 29/13 39/19 49/5 50/3 58/11 61/5 61/19 64/10 64/19 64/20 72/14 75/9 99/11 111/15 118/5 129/3 135/13 136/4 thank [19] 3/5 3/12 3/18 3/18 4/10 4/14 4/25 5/2</p>	<p>56/17 56/18 107/7 107/10 108/7 123/9 127/2 127/3 133/25 136/22 136/25 thankful [1] 123/6 that [991] that's [128] 5/11 7/20 11/20 14/24 15/1 15/19 17/10 17/23 18/14 18/14 18/16 18/17 20/16 21/1 21/2 22/10 22/11 23/25 24/14 27/11 28/11 29/18 29/20 30/6 30/10 31/11 31/24 32/3 32/8 32/10 33/16 34/4 34/4 38/3 39/6 40/9 40/16 42/22 42/24 44/20 45/10 46/1 47/24 49/7 49/24 50/10 50/10 52/8 52/9 53/3 53/20 55/6 55/21 56/6 56/8 56/10 69/9 72/7 75/9 79/6 80/14 80/14 80/15 81/17 81/17 82/1 82/1 82/9 82/24 83/7 83/20 83/21 86/21 87/2 88/5 88/5 89/12 90/12 90/14 91/15 92/19 93/20 94/1 94/7 94/20 95/13 95/22 95/23 96/15 96/19 99/3 99/5 99/20 101/20 104/7 106/10 106/17 108/16 108/19 110/4 110/11 111/3 112/1 112/7 113/23 115/9 115/21 118/7 118/12 118/24 121/5 121/11 122/4 122/15 123/22 124/11 125/12 126/8 127/24 129/3 129/10 129/22 129/25 132/19 135/13 135/15 136/2 136/4 their [35] 6/9 6/12 8/23 17/18 18/25 19/7 21/21 22/9 22/21 23/7 23/17</p>
<p>T table [2] 46/2 64/14 Takata [2] 73/22 104/21 take [39] 8/12 12/14 13/6 13/23 17/13 20/20 22/10 26/5 35/4 40/18 41/1 41/18 42/11 43/7 43/15 48/8 51/17 52/1 52/15 52/21 70/22 73/19 75/13 82/7 96/10 111/12 114/10 115/14 116/19 117/21 118/20 119/1 124/13 125/4 125/7 128/16 133/21 135/17 136/19 take-away [1] 43/15 taken [3] 29/1 29/13 46/2 takes [1] 56/8 taking [4] 3/11 23/4 29/12 136/12 talk [12] 9/14 25/12 32/23 43/9 47/5 62/5 70/1 72/16</p>		

<p>T</p> <p>their... [24] 23/23 25/24 25/25 27/13 29/11 30/19 30/25 32/12 35/3 47/1 48/19 73/2 84/19 93/15 110/17 110/19 111/1 111/8 119/11 119/14 120/7 124/1 135/1 135/10</p> <p>them [33] 5/7 6/21 15/3 19/1 20/14 23/1 23/21 30/5 33/1 42/15 42/15 52/22 53/14 54/12 56/8 56/13 56/14 81/5 85/1 98/8 101/15 102/18 105/1 105/1 115/4 116/2 117/20 125/24 127/14 128/10 130/17 134/6 134/10</p> <p>then [89] 4/15 6/9 7/2 8/14 8/19 12/3 16/6 16/12 17/15 19/6 19/15 19/24 21/3 21/10 21/19 24/8 27/2 27/9 29/23 31/1 31/13 32/6 32/15 32/21 33/21 35/4 37/4 37/16 37/22 38/2 38/12 38/23 39/13 41/14 41/16 41/18 41/22 42/19 44/5 44/18 45/2 46/5 48/1 48/1 48/2 48/2 48/6 48/15 48/18 48/23 52/12 58/7 63/1 65/1 76/10 80/25 82/8 83/17 84/7 84/11 84/18 86/11 91/23 92/9 92/18 94/13 94/19 98/1 100/7 107/21 109/16 111/19 112/17 113/10 114/12 117/9 118/20 118/21 123/15 123/19 124/8 126/5 129/6 129/9 130/24 131/24 133/13 135/5 136/6</p> <p>there [142]</p> <p>there's [65] 5/14 6/7 6/16</p>	<p>6/20 10/1 10/6 12/9 17/8 19/9 24/12 24/16 26/4 26/22 27/1 27/18 33/13 36/16 36/17 37/1 37/11 38/22 40/8 44/3 51/8 51/15 52/18 70/18 72/24 77/20 78/15 79/4 80/7 81/8 81/9 81/10 85/23 90/8 97/11 100/12 104/4 107/4 108/11 108/18 109/11 109/15 110/3 110/11 113/14 113/25 114/18 114/23 114/25 115/16 115/19 116/24 117/1 117/9 119/24 119/25 120/22 121/19 132/7 132/24 133/6 135/25</p> <p>therefore [3] 83/1 126/20 130/8</p> <p>these [50] 5/4 13/14 15/12 18/3 18/25 25/10 25/11 26/16 35/6 42/13 46/2 47/4 47/5 50/6 55/10 55/23 58/5 59/7 59/9 61/9 61/25 62/10 65/17 67/17 67/18 67/24 67/24 68/1 68/2 84/19 85/2 88/24 94/13 95/23 96/6 96/24 97/13 100/7 103/2 103/5 103/6 103/15 108/4 109/6 109/13 110/15 110/16 114/11 118/12 126/25</p> <p>they [185]</p> <p>they're [18] 6/13 16/11 18/10 23/17 28/10 28/24 29/12 30/20 48/9 48/16 52/10 81/11 85/5 102/16 109/14 122/18 125/1 125/2</p> <p>they've [10] 6/11 9/23 25/24 25/25 29/13 34/18 52/21 53/1 131/3 135/20</p> <p>thing [15] 13/12 19/13</p>	<p>40/23 41/4 46/1 46/18 47/3 48/8 50/15 55/12 55/12 56/15 86/8 131/5 133/15</p> <p>things [12] 25/10 25/21 40/25 77/21 86/15 90/9 92/2 98/24 103/24 108/11 124/20 129/21</p> <p>think [155]</p> <p>thinking [2] 10/6 56/2</p> <p>thinks [1] 25/19</p> <p>third [8] 6/6 24/4 43/12 59/11 67/14 77/9 87/10 101/12</p> <p>third-party [1] 67/14</p> <p>this [213]</p> <p>thorough [2] 110/23 122/13</p> <p>those [85] 7/25 8/10 8/20 9/1 9/21 10/3 13/20 14/18 15/5 19/5 20/1 20/4 20/13 20/23 23/25 26/10 32/24 35/15 40/7 41/2 42/12 42/17 48/18 50/13 56/23 60/13 63/1 65/13 66/5 66/9 66/10 67/5 69/5 73/10 73/17 74/1 74/2 76/17 77/3 81/1 83/3 86/5 86/10 86/12 86/13 86/15 86/15 87/14 89/9 90/3 91/3 92/1 93/10 97/10 103/25 104/1 106/16 108/6 111/22 112/4 113/2 114/4 114/10 114/17 115/2 115/6 117/24 118/16 118/16 118/20 120/19 122/3 125/5 125/18 126/6 126/11 129/5 130/1 130/1 130/12 130/22 130/24 133/10 134/6 138/13</p> <p>though [9] 59/3 82/18 84/25 88/23 98/5 99/10 111/3 114/6 130/16</p>
---	---	---

<p>T</p> <p>thought [3] 25/22 37/15 130/17</p> <p>thread [1] 112/11</p> <p>three [14] 4/8 5/21 5/25 15/5 15/25 16/1 25/23 43/9 43/10 46/6 58/15 59/10 78/4 101/12</p> <p>threshold [1] 64/10</p> <p>threw [1] 53/18</p> <p>Throckmorton [1] 2/23</p> <p>through [12] 5/7 9/16 23/23 84/25 90/23 94/14 102/22 102/22 118/25 119/14 121/3 126/24</p> <p>Throws [1] 37/20</p> <p>Thursday [1] 131/21</p> <p>thus [1] 73/8</p> <p>time [42] 5/6 12/14 12/15 12/18 12/20 12/22 13/3 13/6 13/7 19/7 20/3 21/8 31/2 33/7 33/9 35/5 45/16 47/6 54/20 54/22 55/5 55/6 60/24 61/11 67/1 72/11 82/6 83/15 83/25 87/16 94/24 98/19 99/19 114/21 115/12 122/1 123/7 127/24 130/17 133/17 134/2 134/4</p> <p>time-consuming [1] 21/8</p> <p>timely [3] 6/4 10/18 10/22</p> <p>times [3] 30/19 42/7 120/7</p> <p>timing [1] 35/13</p> <p>today [27] 4/1 4/2 5/6 6/1 18/9 29/10 37/9 40/12 46/2 51/4 51/23 76/16 82/18 94/11 101/2 108/2 110/17 122/2 125/19 129/4 130/20 131/6 131/24 133/8 134/4 134/7 134/25</p> <p>today's [2] 10/14 78/2</p>	<p>together [5] 8/12 8/25 114/11 130/17 131/15</p> <p>told [9] 8/24 9/19 12/25 25/16 35/2 51/22 120/12 131/24 133/22</p> <p>Tomra [1] 4/6</p> <p>too [17] 21/2 28/10 28/16 42/25 48/10 63/8 70/19 74/16 75/18 75/20 88/5 88/5 99/6 117/4 117/4 117/5 117/9</p> <p>took [6] 58/15 66/3 67/22 81/22 90/3 101/13</p> <p>top [3] 51/2 89/6 99/7</p> <p>tort [2] 64/11 132/13</p> <p>totally [1] 28/7</p> <p>touch [1] 109/12</p> <p>touched [1] 127/22</p> <p>touching [2] 44/4 127/10</p> <p>toward [1] 12/19</p> <p>TRACY [2] 2/13 3/16</p> <p>trade [1] 26/7</p> <p>tragic [1] 108/4</p> <p>training [24] 13/1 13/17 14/17 66/8 66/20 67/11 67/12 85/16 90/22 117/18 118/1 118/1 118/2 118/3 118/5 118/6 118/7 118/9 118/10 118/10 118/11 118/21 118/25 130/23</p> <p>transcribed [1] 138/10</p> <p>transcript [3] 1/13 138/5 138/12</p> <p>transmitted [1] 26/3</p> <p>transparent [1] 33/10</p> <p>transparently [1] 26/10</p> <p>traveled [5] 3/22 4/1 4/2 4/5 4/6</p> <p>traveling [1] 136/18</p> <p>tread [1] 21/1</p> <p>treading [1] 29/22</p> <p>treated [2] 6/6 23/9</p>	<p>treatise [5] 27/4 31/16 31/16 31/17 31/17</p> <p>trial [31] 7/22 26/15 28/9 32/3 32/6 32/6 53/6 57/6 58/14 62/21 65/20 68/11 68/12 72/11 75/17 75/22 94/10 95/9 105/7 105/19 106/1 106/4 112/3 114/21 115/3 115/7 115/10 115/14 115/15 115/20 115/22</p> <p>trials [1] 32/2</p> <p>tried [6] 18/17 21/7 53/6 53/7 122/12 122/15</p> <p>triggering [1] 32/19</p> <p>truck [1] 63/24</p> <p>true [4] 31/2 32/3 81/3 138/5</p> <p>truly [1] 47/7</p> <p>trumpeted [1] 40/14</p> <p>trust [1] 110/18</p> <p>truth [2] 15/19 16/8</p> <p>truths [1] 14/9</p> <p>try [14] 5/7 5/19 7/8 42/15 79/16 84/9 84/10 99/6 99/18 99/23 107/17 113/20 113/21 121/2</p> <p>trying [10] 23/3 28/24 38/20 47/14 49/4 50/19 50/22 50/22 54/25 86/14</p> <p>turn [5] 5/1 23/5 23/24 78/7 133/19</p> <p>Turning [1] 108/8</p> <p>turns [1] 108/22</p> <p>twice [1] 53/23</p> <p>Twitter [1] 10/8</p> <p>two [35] 8/12 8/12 8/19 16/1 16/11 17/14 17/17 24/6 39/22 43/11 44/3 54/2 60/2 60/3 60/6 60/10 61/9 61/22 62/10 63/1 66/4 66/13 68/17 78/15 85/5 88/24 89/20</p>
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<p>T</p> <p>two... [8] 89/23 94/24 97/23 98/1 117/7 118/4 118/22 129/18</p> <p>two-year [1] 17/14</p> <p>type [6] 40/23 79/4 79/6 92/6 99/25 121/19</p> <p>types [4] 29/8 75/13 77/20 77/22</p>	<p>57/11 57/15 58/3 58/20 58/23 59/18 71/18 72/4 72/8 72/11 73/7 73/9 73/17 74/2 74/7 75/17 77/2 77/12 80/24 87/6 95/24 95/24 96/4 102/16 105/3 106/25 112/3 113/3 113/24 114/21 115/9 115/14 115/24 121/15 121/24 122/3 127/13 128/11 131/12 136/19</p>	<p>73/6 78/22 78/24 101/13 138/14</p> <p>UNIVERSITY [2] 2/4 2/5</p> <p>unjustifiable [2] 31/8 31/12</p> <p>unknowingly [1] 89/23</p> <p>unknown [1] 118/12</p> <p>unlawful [1] 116/20</p> <p>unless [3] 27/17 42/1 129/14</p> <p>unlike [4] 77/20 90/4 114/18 114/18</p> <p>unlocked [1] 129/16</p> <p>unnecessary [1] 77/17</p> <p>unpack [1] 39/21</p> <p>unprecedented [2] 136/2 136/4</p> <p>unreasonable [1] 25/5</p> <p>unseal [1] 48/1</p> <p>unsurprising [1] 17/4</p> <p>until [1] 39/25</p> <p>untrue [1] 33/16</p> <p>unusual [4] 27/22 40/9 52/25 135/22</p> <p>up [37] 5/13 13/2 13/17 20/10 23/4 25/24 25/25 28/1 29/10 34/15 36/25 37/22 38/8 42/5 42/22 45/9 47/12 48/9 50/22 50/23 56/8 56/23 57/21 65/19 79/21 91/18 96/23 113/10 114/17 125/17 127/17 129/13 129/16 133/15 134/11 135/11 136/13</p> <p>upheld [1] 117/5</p> <p>upon [4] 52/23 57/10 61/12 89/4</p> <p>urging [1] 20/20</p> <p>us [18] 8/24 15/17 16/19 18/2 19/19 21/18 40/6 55/20 101/17 102/14</p>
<p>U</p> <p>U.S [3] 14/2 33/4 55/22</p> <p>U.S. [3] 66/20 85/16 85/17</p> <p>U.S.-based [3] 66/20 85/16 85/17</p> <p>U.S.C [2] 57/3 59/20</p> <p>ultimate [3] 63/7 67/20 132/15</p> <p>ultimately [40] 8/14 28/5 48/5 60/16 64/23 64/25 65/12 65/13 65/25 67/21 70/10 73/2 74/17 75/3 75/15 78/25 79/3 79/8 79/21 80/2 80/7 80/18 87/22 92/13 93/15 94/15 106/3 110/7 111/1 111/9 111/18 113/7 113/8 118/11 121/9 121/21 126/14 127/21 128/10 132/5</p> <p>unable [1] 131/4</p> <p>uncharged [2] 108/24 109/8</p> <p>unclear [1] 132/2</p> <p>uncover [2] 96/11 96/13</p> <p>under [67] 6/8 8/10 15/8 17/21 18/4 18/7 18/10 18/24 18/25 20/25 22/3 22/4 24/19 32/16 33/18 35/4 38/8 43/12 43/13 45/14 45/20 46/5 51/8 51/9 53/14 56/10 56/25</p>	<p>undercuts [2] 114/6 114/7</p> <p>underlying [2] 43/20 68/2</p> <p>undermined [1] 65/5</p> <p>undermines [1] 39/9</p> <p>underpin [2] 58/19 90/14</p> <p>underpinned [1] 74/21</p> <p>understand [16] 29/17 34/15 39/12 43/18 47/14 51/5 53/13 70/18 70/19 77/18 82/8 85/6 85/19 96/21 103/21 135/24</p> <p>understanding [4] 17/11 33/10 81/8 81/10</p> <p>Understood [1] 102/9</p> <p>undertake [1] 77/23</p> <p>undertaken [1] 77/6</p> <p>undisputed [4] 14/20 22/10 27/15 130/5</p> <p>undo [5] 111/13 115/4 119/6 120/8 120/10</p> <p>undoing [2] 112/21 112/25</p> <p>undoubtedly [1] 93/10</p> <p>unfettered [2] 20/2 36/23</p> <p>unfolded [1] 44/24</p> <p>uniformly [1] 121/18</p> <p>unique [2] 32/13 43/13</p> <p>UNITED [25] 1/1 1/6 1/14 1/19 1/20 4/13 9/22 56/19 56/20 57/4 59/11 59/21 60/8 60/16 62/1 63/18 64/8 65/16 70/21 70/22</p>	

<p>U</p> <p>us... [8] 102/17 128/25 130/19 132/2 133/24 134/4 134/16 134/18</p> <p>use [3] 7/21 7/22 27/6</p> <p>used [5] 7/7 14/24 117/7 122/14 122/15</p> <p>uses [1] 117/3</p> <p>using [3] 53/3 58/2 63/6</p> <p>usurps [1] 80/10</p> <p>UTAH [4] 2/4 2/4 2/5 29/5</p> <p>utilized [1] 113/15</p>	<p>41/21 62/7 71/6 92/16 93/12 93/14 102/15 108/22 130/8</p> <p>victim's [1] 54/21</p> <p>victims [129] 5/25 6/8 6/15 6/21 7/4 7/9 8/9 8/9 8/14 8/14 8/16 8/16 9/11 9/18 10/23 11/7 11/11 11/24 15/7 15/8 17/21 17/21 18/4 19/15 19/17 19/23 20/4 20/25 20/25 21/20 22/17 22/21 23/2 24/2 25/8 25/16 32/23 34/9 35/3 35/12 35/25 36/3 36/20 37/8 37/10 38/18 39/25 40/1 41/17 45/23 46/22 46/23 47/22 48/7 48/7 48/9 48/18 50/6 50/14 55/18 56/7 56/22 56/25 57/10 57/14 58/20 59/20 70/5 70/6 70/13 70/15 71/1 71/11 71/18 71/18 72/2 72/4 73/17 73/25 74/2 74/5 77/9 80/3 80/24 81/11 81/15 82/4 82/6 82/20 82/25 87/14 89/4 93/3 100/8 100/11 100/25 101/1 101/4 101/6 101/18 102/16 104/18 106/25 108/1 108/14 108/24 109/7 110/15 110/24 110/25 111/21 113/20 120/15 121/12 123/14 123/19 123/21 124/7 125/5 126/6 126/12 127/13 128/6 128/12 128/21 130/13 133/12 133/12 136/8</p> <p>victims' [43] 5/3 5/12 5/20 5/22 6/8 6/17 7/2 7/10 9/7 9/17 10/14 10/15 10/17 11/24 14/22 15/7</p>	<p>15/16 19/6 20/3 20/5 20/11 20/12 20/24 21/20 22/8 22/11 22/12 23/2 23/8 26/2 31/14 34/11 34/14 41/20 45/19 54/8 54/9 59/2 127/13 128/12 129/5 133/11 133/17</p> <p>videoconferencing [1] 138/10</p> <p>view [21] 18/8 24/1 48/24 60/2 65/10 72/1 74/15 75/23 77/14 77/17 79/1 80/3 82/23 83/2 84/7 98/9 103/1 103/3 103/13 103/25 104/13</p> <p>views [4] 48/19 70/19 111/9 126/24</p> <p>vindicate [3] 46/22 47/3 48/16</p> <p>vindicated [1] 47/5</p> <p>violate [1] 120/6</p> <p>violated [7] 6/9 10/15 11/11 37/6 80/25 81/5 83/3</p> <p>violates [3] 10/12 30/10 30/11</p> <p>violating [4] 21/24 21/25 22/1 55/10</p> <p>violation [11] 7/1 37/12 50/23 57/3 59/18 83/12 84/1 103/1 105/16 106/19 135/8</p> <p>violations [3] 33/23 103/14 104/4</p> <p>violence [2] 99/2 99/3</p> <p>violent [1] 94/6</p> <p>Virginia [1] 2/18</p> <p>VOLUME [1] 1/13</p> <p>voluntary [1] 102/22</p> <p>voted [1] 45/22</p>
<p>V</p> <p>vague [1] 11/13</p> <p>valuable [1] 5/6</p> <p>various [5] 7/20 17/1 45/8 71/17 78/13</p> <p>Vecere [1] 4/6</p> <p>vehicle [2] 65/13 87/10</p> <p>vendor [1] 67/15</p> <p>verdict [2] 62/25 88/7</p> <p>very [53] 3/12 3/15 3/18 4/23 4/25 5/2 5/3 5/6 11/20 19/9 21/21 24/23 25/20 26/15 27/22 31/16 34/21 38/3 40/9 42/7 43/5 43/24 49/24 50/18 52/9 52/24 54/14 55/14 55/23 76/2 78/13 78/16 79/11 84/2 100/16 101/8 106/7 107/7 110/23 112/12 114/5 116/25 122/12 127/2 132/2 132/2 132/6 133/15 133/17 133/25 134/24 135/16 136/13</p> <p>via [1] 138/9</p> <p>vicariously [1] 66/15</p> <p>victim [21] 6/25 7/5 7/15 9/19 13/5 14/23 17/5 17/8 17/25 18/19 22/3 24/2</p>		<p>W</p> <p>wait [8] 19/2 27/18 28/1 33/23 36/2 36/7 37/1</p>

<p>W wait... [1] 42/19 waive [5] 31/18 31/20 32/12 32/18 100/9 waiver [5] 33/6 68/20 68/23 123/1 123/2 walk [1] 118/24 walked [1] 109/20 walking [1] 32/25 want [42] 4/7 5/10 9/13 9/13 12/13 15/11 18/6 18/6 18/9 20/5 21/1 21/19 27/17 28/4 37/12 40/12 42/18 44/11 53/2 55/13 69/23 73/12 74/17 81/7 82/7 82/7 83/21 83/21 86/17 90/24 92/12 95/15 107/23 107/25 109/21 119/9 119/15 126/16 130/14 133/20 134/6 134/10 wanted [5] 40/18 109/12 119/3 130/2 131/1 wants [1] 124/6 warranted [3] 58/24 59/16 72/7 warrants [2] 135/16 136/5 was [218] Washington [1] 2/21 wasn't [8] 86/11 86/12 88/11 88/12 105/18 131/25 132/1 133/2 watching [1] 30/3 way [34] 12/9 12/13 15/14 17/8 19/1 20/7 20/8 25/14 32/8 34/4 34/5 34/9 35/17 39/21 41/15 46/22 50/12 54/11 54/13 55/24 68/18 82/24 83/3 84/9 84/11 84/17 88/10 88/19 94/8 95/4 104/23 116/9 117/25 125/15 ways [4] 21/7 70/3 77/1</p>	<p>94/10 we [305] we'd [2] 29/20 84/6 we're [44] 7/24 15/2 15/14 16/6 18/22 20/10 23/22 23/23 28/3 28/3 35/16 38/17 38/21 38/22 41/4 41/6 47/2 47/4 50/25 51/1 51/6 54/23 54/24 54/24 55/5 85/22 85/22 86/5 97/24 97/24 100/19 103/18 104/9 104/15 104/17 110/18 123/2 128/5 128/18 128/20 128/22 128/22 130/21 131/24 we've [38] 7/6 7/11 8/1 8/8 8/13 8/24 10/20 11/1 12/6 15/25 16/4 16/24 21/7 22/22 23/21 24/4 26/16 28/14 28/20 29/2 31/7 31/10 34/3 41/7 52/25 56/9 56/9 74/4 76/15 84/3 94/11 101/15 104/19 128/14 129/6 130/20 131/11 132/19 wealthy [3] 19/14 35/24 45/1 wearing [1] 138/9 website [2] 102/22 102/22 week [3] 20/18 25/18 54/1 weeks [1] 54/2 weigh [1] 39/12 weighed [1] 59/23 weight [1] 39/5 welcome [1] 107/18 welcomed [1] 133/24 well [66] 8/17 16/4 19/21 20/22 21/20 22/5 22/24 23/13 23/14 24/12 27/18 28/22 29/21 31/1 31/16 32/20 33/8 34/20 36/4 36/7 37/19 39/24 41/3</p>	<p>41/18 42/11 42/19 43/22 44/21 45/7 46/15 51/19 53/16 55/24 61/3 66/4 73/25 77/20 80/8 82/5 82/15 82/17 83/5 87/14 88/9 91/6 91/13 94/19 96/10 98/24 103/23 105/5 106/6 106/11 107/15 116/11 128/1 129/8 129/25 130/20 131/20 131/24 132/13 133/1 134/11 135/5 135/6 well-regarded [1] 31/16 went [6] 19/16 64/1 84/25 110/22 111/8 129/21 were [139] weren't [2] 35/12 48/7 what [182] what's [11] 26/3 27/11 33/10 34/16 40/22 79/25 103/7 108/16 113/21 123/23 129/10 whatever [9] 39/18 52/20 66/10 75/3 100/1 105/21 118/15 132/4 134/2 whatsoever [4] 6/17 10/2 13/2 13/17 when [57] 6/22 7/22 8/14 10/8 11/13 19/7 20/6 22/20 25/15 28/23 29/10 31/17 32/4 32/20 39/16 47/6 47/7 51/11 52/5 55/11 55/19 58/8 59/15 63/25 71/13 71/19 78/17 80/1 82/12 82/13 83/14 83/15 83/19 83/25 84/11 85/13 85/20 86/23 91/3 91/4 95/22 101/10 103/1 113/10 120/3 120/20 120/24 123/10 123/19 126/12 127/21 128/2 129/12 130/1 132/14 132/17 135/5</p>
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<p>W</p> <p>whenever [1] 38/22</p> <p>where [42] 11/16 14/15 16/7 17/1 33/20 35/1 35/9 42/17 45/18 45/19 51/20 53/25 55/16 62/19 63/15 63/24 67/9 74/14 74/15 74/25 76/12 77/15 77/21 78/15 80/7 87/3 87/8 92/7 94/6 95/17 105/22 105/24 110/11 112/21 114/11 122/5 127/24 128/18 128/21 129/2 130/12 134/21</p> <p>Whereas [1] 49/21</p> <p>wherever [1] 52/16</p> <p>whether [37] 6/14 17/21 18/9 27/9 29/20 33/5 33/6 56/25 58/7 63/1 63/9 69/14 70/13 70/21 82/24 84/18 93/2 93/4 99/3 102/15 109/6 110/19 111/19 113/1 114/20 115/24 117/2 122/2 122/3 122/23 123/3 126/4 131/9 131/11 132/15 132/24 133/6</p> <p>which [63] 9/4 11/6 11/16 11/17 12/6 12/16 15/13 21/4 21/8 24/1 24/4 24/23 24/24 27/5 28/1 28/2 28/6 28/9 28/19 30/12 31/7 32/18 35/17 39/2 45/12 46/5 47/15 52/4 53/10 56/3 56/5 56/15 59/11 67/4 68/9 73/13 84/16 86/5 86/18 89/22 97/11 98/25 99/6 100/10 106/15 107/15 108/2 109/5 110/20 113/11 113/20 114/21 117/17 119/25 125/23 125/25 128/12 128/23 129/19 130/21</p>	<p>132/6 132/10 133/8</p> <p>while [4] 23/17 43/6 110/20 123/21</p> <p>who [26] 3/6 3/11 3/22 4/5 4/6 7/3 7/3 8/6 14/18 15/7 17/8 20/18 20/25 52/25 60/3 60/10 60/11 63/24 66/8 73/16 92/13 104/18 104/22 110/14 113/20 133/12</p> <p>who's [5] 4/2 29/4 60/7 92/13 95/8</p> <p>whole [3] 41/9 73/21 108/12</p> <p>why [35] 8/9 18/2 20/6 24/15 24/16 26/1 26/4 26/9 29/12 39/11 39/18 43/14 46/16 48/24 49/15 52/5 52/9 53/10 53/12 55/21 82/1 89/3 89/24 93/7 94/1 113/23 126/8 126/8 127/12 128/12 131/20 131/21 133/4 135/15 135/22</p> <p>WICK [1] 2/23</p> <p>wife [1] 4/8</p> <p>Wild [21] 35/7 35/22 65/6 65/10 65/11 78/19 79/11 80/13 81/18 81/23 109/17 112/18 112/20 113/17 113/25 114/4 121/5 128/14 128/15 128/16 128/18</p> <p>will [44] 3/11 5/1 5/6 5/25 10/10 11/16 11/21 16/7 18/1 19/24 20/1 20/3 21/5 30/22 33/18 34/11 34/15 39/13 46/21 48/16 55/18 56/4 56/12 56/23 57/7 57/10 72/16 78/7 95/14 107/17 114/10 119/4 121/2 124/15 125/2 125/3 125/7 127/16 131/2 132/8 132/8</p>	<p>134/10 136/10 136/19</p> <p>willfully [1] 14/2</p> <p>WILLIAMS [3] 138/4 138/17 138/17</p> <p>willing [2] 15/16 94/7</p> <p>win [1] 38/11</p> <p>window [2] 47/6 50/10</p> <p>wire [1] 61/4</p> <p>withhold [1] 23/11</p> <p>withholding [2] 22/20 23/18</p> <p>within [9] 31/2 31/3 45/14 61/10 99/18 99/19 124/18 132/16 132/19</p> <p>without [16] 6/18 8/3 17/10 18/20 26/2 31/11 47/21 53/13 53/18 53/19 67/11 111/10 115/12 116/1 130/10 133/23</p> <p>witness [1] 9/19</p> <p>won't [3] 51/19 57/6 130/21</p> <p>wonder [1] 52/5</p> <p>wondering [3] 49/8 88/22 124/22</p> <p>word [1] 14/24</p> <p>wording [2] 11/20 11/20</p> <p>words [4] 9/21 91/11 98/19 122/17</p> <p>work [3] 34/4 36/9 68/18</p> <p>worked [1] 10/21</p> <p>working [1] 46/5</p> <p>works [1] 34/5</p> <p>world [12] 9/23 10/8 17/10 17/15 84/15 116/19 116/21 116/23 117/2 129/4 131/13 135/9</p> <p>WORTH [9] 1/3 1/7 1/22 2/24 42/14 52/6 136/18 138/19 138/20</p> <p>would [210]</p> <p>wouldn't [7] 12/10 40/2</p>
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<p>W wouldn't... [5] 52/5 88/18 88/18 128/10 129/7 woven [1] 124/22 Wright [2] 31/15 31/20 writ [1] 43/14 writing [1] 46/10 written [4] 26/20 26/24 27/9 27/10 wrong [2] 17/23 98/9 wrote [6] 32/9 44/8 55/12 55/12 84/15 135/15</p>	<p>84/4 84/4 98/8 100/15 100/16 129/18 your [147]</p>	<p>Case 4:21-cr-00005-O Document 85 Filed 05/12/22 Page 189 of 189 PageID 1293</p>
<p>Y ya [1] 18/23 yeah [12] 31/22 34/23 35/23 44/13 44/22 47/19 51/16 85/7 92/24 96/17 97/6 101/23 year [10] 17/14 31/11 35/17 35/19 68/21 83/15 115/18 120/13 120/21 136/4 years [8] 19/11 37/20 42/18 42/18 42/24 68/9 78/4 113/11 yes [28] 3/24 26/15 29/24 35/11 35/14 36/17 43/19 43/21 43/23 44/19 45/6 47/16 47/23 48/4 48/14 52/24 85/12 91/15 91/22 96/20 100/3 100/6 101/11 102/2 102/2 105/20 107/20 123/9 yet [1] 18/2 York [2] 2/11 2/11 you [410] you'd [2] 81/12 82/11 you're [10] 9/12 35/19 43/6 49/25 79/21 83/12 98/15 99/6 103/19 119/5 you've [12] 8/17 15/22 16/10 21/17 34/1 37/19</p>	<p>Z zeroing [2] 84/12 84/14 ZOIE [3] 138/4 138/17 138/17 zone [2] 132/16 132/19 zwilliams.rmr [1] 138/21</p>	